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CONVEYANCER'S NOTEBOOK

LAND REGISTRY PRACTICE—PLANS

The Chief Land Registrar has issued a note reminding solicitors of the need for plans drawn on or attached to instruments affecting registered land to be signed or, where a corporation is a party, sealed. Thus, when a transfer of part of the land in a title is by reference to a plan, the plan must, by virtue of rule 98 of the Land Registration Rules, 1925, and form 20 in the Schedule to the rules, be signed by the transferor and *by or on behalf of* the transferee. The plan drawn on a lease of part, or on a deed which grants a rentcharge issuing out of part of the land in a title, must be signed similarly (rule 113) and so, too, must the plan on a charge of part, a discharge of part, or any other instrument which deals with part of the land comprised in a title (rule 79). A plan may be signed on behalf of a transferee, lessee, chargee or other grantee by his solicitor, *who should describe himself as such.*

When, under these provisions, a company incorporated under the Companies Acts is required to " sign " a plan, it has no signature, so that its authorised officers should affix the seal to the plan and themselves sign it in accordance with the provisions of the company's articles, because that method of execution is for all contracting purposes the same thing as the signature of an individual: *Dartford Union Guardians* v. *Trickett & Sons* (1889) 59 L.T. 754, 759.

LAND REGISTRY PRACTICE—ST. ANNES SUB-OFFICE

The Chief Land Registrar has issued the following notice:

" 1. To relieve congestion in H.M. Land Registry, Lincoln's Inn Fields, the registers, filed plans and index maps relating to

the Counties of *Lancashire*, *Cheshire*, *Westmorland* and *Cumberland* were removed to Government Buildings, St. Annes, Lancs, on March 7, where the registration of title work arising from those areas will be done.

"2. It would be a great convenience if applications for registration, searches, etc., affecting titles in these areas could be sent there direct.

"3. Personal searches of the registers and index maps may be made at St. Annes, but where it is desired to inspect these records in London they will be made available at Lincoln's Inn Fields at three days' notice.

"4. The full address of the St. Annes sub-office is:

H.M. Land Registry,
Government Buildings,
Moorland Road,
St. Annes,
Lancashire,

but the G.P.O. have agreed that the postal address should be shortened to:

H.M. Land Registry,
Lytham St. Annes,
Lancs.

Telephone No. St. Annes 2300."

We may, perhaps, remind our readers that the Hawkenbury sub-office (H.M. Land Registry, Hawkenbury, Tunbridge Wells, Kent; Telephone: Tunbridge Wells 2780/91) deals with the county boroughs of *Canterbury*, *Eastbourne*, *Hastings* and *Oxford*, the city and county of *Bristol* and the counties of *Berkshire*, *Cornwall*, *Devon*, *Dorset*, *Hampshire*, *Kent*, *Somerset*, *Sussex*, *Wiltshire*.

Land Registry Practice—Absolute Leasehold Title

Our reason for reverting to the subject of absolute leasehold titles is that some solicitors admit that they have never heard of them and yet others do not bother to obtain them for their clients when they are readily available. Put very shortly, a good leasehold title guarantees the lease but is silent on the question of the lessor's title whereas an absolute leasehold title guarantees the reversion. Of course an absolute leasehold title does not guarantee that the lease remains valid: it may have become voidable for breach of covenant, including a covenant not to assign without licence.

Where the lessor's title is registered—and this may be discovered by making a search under rule 286—there is little difficulty. He

will have to lodge his land certificate for the lease to be noted against it and the lessee can apply for absolute leasehold title even though he has never seen the freehold title. If the lessor is himself not registered with an absolute title, naturally an absolute leasehold title will be refused. If the lease being registered is a sub-lease the intermediate leasehold title will have to be, or have been, approved by the Registry. If it is itself registered with absolute title, again there is no difficulty even if the sub-lessee has never seen it.

Some solicitors object to an absolute leasehold title on the ground that the land certificate shows the restrictive covenants affecting the freehold, but this is really acting the ostrich, for the restrictive covenants registered against the freehold bind lessees whether they know of them or not: *White* v. *Bijou Mansions, Ltd.* [1938] Ch. 351.

A lessee may be registered with absolute leasehold title whether the freehold is registered or not. If a "purchaser" of a flat is taking a lease of ninety-nine years of unregistered land and stipulates, as he ought to do, to see the lessor's title, he can apply for an absolute title in the same way as he could apply for an absolute title to freehold land where the vendor retains the title deeds.

It appears to us to be self-evident that an absolute title is superior to a good leasehold title. Where a lease exceeds twenty-one years it has, or may well acquire in the future, a considerable capital value, which depends on the lease being secure. That capital value justifies an inquiry into the freehold title. Indeed, where flats are being purchased, many building societies and local authorities lending on mortgage require to be satisfied as to the freehold title. Even apart from the general superiority an inquisitiveness as to the reversion often brings to light other points. For example, we recently discovered that a twenty-eight year lease of land had not been registered with a substantive title, as it should have been because the freehold title was registered. In the case of flats, very often rights over gardens and ways are granted and it is essential to see that the lessor is in a position to grant these rights. This may not be apparent unless the title is inquired into and the only certainty that the inquiry is complete is the grant of an absolute title. The lessor may have mortgaged the freehold and the consent of the mortgage to the lease required. After all, if an absolute title is granted but there is something wrong, *e.g.*, because half the ground belongs to someone else or because on granting another lease the lessor did not make the necessary reservations, the state pays.

Contracts to grant leases commonly occur where a flat is being "sold" or a building lease is being granted. The premium usually justifies the purchaser-lessee insisting on deduction of the lessor's title, but even where the lessor adamantly refuses, the lessee is not always without remedy, for, if the lessor's title is registered, this fact may be discovered and the lessor find it very difficult to refuse an authority to inspect the register. Such a refusal would obviously arouse suspicion and the lessee would be rather rash to pay his premium in the face of such refusal.

It will be appreciated that we are only considering a lease of more than twenty-one years. Leases at rack rents not exceeding this period would not normally justify inquiry into the reversion, though even in these cases the question should be asked, whether the consent of any mortgagee or other person is required to the grant of the lease.

Charities Bill

The purpose of the Charities Bill, which was introduced by the Lord Chancellor in the House of Lords on February 6, 1960, and debated in that House on March 1, is to give effect, with some modifications, to the proposals contained in the White Paper "Government Policy on Charitable Trusts in England and Wales" (Cmd. 9538). The White Paper accepted the majority of the recommendations of the Report of the Committee on the Law and Practice relating to Charitable Trusts (Cmd. 8710) save those which proposed the control of charities by the central or local authorities. The principal purposes of the Bill are fourfold:

(a) to bring up to date the machinery of administration of charity law,
(b) to provide for the registration of charities,
(c) to specify the circumstances in which the objects of a charitable trust may be changed, and
(d) to provide a statutory foundation for voluntary co-operation between the trustees of charities and the statutory welfare services in common fields of welfare on a basis of equality and partnership.

No attempt is made to provide a definition of charity in English law: to discover whether or not a purpose is charitable it will still be necessary to resort to the preamble to the Statute of Charitable Uses, 1601, and the classification of Lord Macnaghten in *Income Tax Special Purposes Commissioners* v. *Pemsel* [1891] A.C. 531. In so far as the Bill is concerned with the general law of charity and the jurisdiction of the court it applies to all charities, and

charities generally will be able to take advantage of the enabling powers of the central authorities. The powers of inquiry and supervision of these authorities are, however, restricted to certain charities only, as also are the provisions for registration.

The Bill retains two central authorities, the Charity Commissioners and the Minister of Education, but the Home Secretary is made responsible to Parliament for the Commissioners and their appointment will in future lie with him. The division of functions between the Commissioners and the Minister is to be regulated by Orders in Council. It may well be a matter for regret if there is perpetuated the present unsatisfactory division of functions which frequently leads to difficulty in deciding with which authority jurisdiction lies, doubt in this respect being present in some cases not only in the minds of the trustees who seek the advice or action of the authority in question but also of the authorities themselves. Certainly there seems to be a very strong case for restricting the jurisdiction of the Minister to those charities which are purely educational. While the central authorities are not to have power to act in the administration of charities, it is made incumbent upon them to promote and make effective the work of charities in meeting the needs designated by their trusts.

The offices of the Official Trustee of Charity Lands and the Official Trustees of Charitable Funds are united in a single individual, the Official Custodian for Charities. The Official Custodian is to be such officer of the Charity Commissioners as they may from time to time designate: he is entirely the responsibility of the Commissioners, but the property of educational charities may be vested in him. It is expressly provided that the Official Custodian shall not exercise any powers of management save in the case of a common investment fund.

The Bill provides for the establishment of a central register of charities, the object of which is to make known the existence of charitable resources so that the best use may be made of them. The register should prove a valuable innovation. All charities are required to be registered except exempt charities (as defined in the Bill), charities excepted by order or regulation, charities not having any permanent endowment nor any income from property amounting to more than £15 per year nor the use and occupation of any land, and charities which are registered places of worship within section 9 of the Places of Worship Registration Act, 1855, as amended. Charities not required to be registered may, however, obtain voluntary registration. Provision is made for the removal from the register of institutions not qualifying for registration; for example, because they have ceased to be charities. The great

advantage of registration is that it provides prima facie evidence of charitable status, and hence, for example, eligibility for tax relief.

Provision is made for the co-ordination of charitable activities by including powers enabling information to be exchanged, for example, between central authorities and local authorities, and by enabling local authorities to maintain indices of local charities within their areas and to carry out reviews of such charities. Co-operation between charities, and between charities and local authorities, is also facilitated. Local authorities may obtain from the central authorities information as to charities within their areas, but no review of or intervention in the affairs of a charity by a local authority is possible without the consent of the trustees. In departing in this respect from the recommendations of the Nathan Committee the Government has shown wisdom: the voluntary movement, the desirability of which is generally accepted, seems far more likely to provide a useful counterpart to the statutory activities of local authorities if it is allowed to do so without compulsion. The new provisions empowering the central authorities the better to co-ordinate the work of charity are, however, accompanied by a re-enactment of their existing powers of inquiry in the case of all except the exempt charities. The new power to require accounts to be audited replaces the existing powers to call for statements of account.

A clause which is not so clearly drafted as are most parts of the Bill lays down and extends the existing law on the circumstances in which charitable property may be applied *cy-près* and declares the duty of trustees to apply to the appropriate authority for *cy-près* application where the occasion so demands. It appears, however, that there is no intention of altering the present law whereunder *cy-près* application on failure of trusts is possible only where the donor of the property has indicated a general charitable intent. The court is given jurisdiction in certain cases where a charity is regulated by Royal Charter or a statute, and the alteration of trusts regulated by statute is simplified by providing for effect being given to the schemes for their amendment by statutory instrument instead of, as at present, by Bill.

The existing scheme-making power of the central authorities, concurrent with that of the court, is preserved, but a new power is given to the Charity Commissioners to act on a reference by the Home Secretary where for special reasons he thinks a scheme desirable and, since in this case the trustees may apparently be overridden, there is here, perhaps, ground for criticism of the Bill. New powers, including the removal or suspension of trustees, are given

to the central authorities with a view to safeguarding charity property in cases of misconduct or mismanagement.

An important innovation is the power given to the central authorities to make common investment schemes for the establishment of common investment funds for groups of charities which wish to have the advantages of unified management and spread of investment. Such funds may be managed by the Official Custodian with the advice of a panel of investment experts. Every charity is to have power to invest in common investment schemes, unless such power is expressly excluded by its trusts.

While the significance of "mixed" charities is swept away restrictions on dealing with charity property are retained. Property which forms part of the permanent endowment of a charity is not to be charged, or, in the case of land in England or Wales, sold, leased or otherwise disposed of, without the consent of the court or the appropriate central authority. At present trustees who have obtained consent to sell land and received an offer for it must give notice of the receipt of this offer and then reject it if a better offer is subsequently received. This practice leaves much to be desired, and, because it is unsatisfactory from the point of view of the prospective purchaser, may redound harmfully to the charity. The matter may not be one for legislation, but it is to be hoped that the advent of a new Charities Act may see some modification of the existing procedure.

Provision is made to enable the Attorney-General to apply for the winding up of a charitable company and to prevent the company evading these proceedings by altering its constitution so that it ceases to be charitable. This provision stops an important gap in the law.

Amongst various miscellaneous provisions relating to charities and their affairs particular mention may be made of the abolition of the law of mortmain and the consequential provisions as to the validity of assurances and dispositions hitherto affected by the mortmain provisions. No one is likely to regret the disappearance of this anachronistic and troublesome survival from feudal times.

The supplemental provisions refer *inter alia* to the schedules containing formidable lists of consequential amendments and repeals and contain transitional provisions. In particular the Charitable Trusts Acts, 1853–1939, are repealed *in toto* so that the Bill in its forty-eight clauses and seven schedules not only seeks to introduce important new provisions into the law of charity but consolidates within a comparatively small compass provisions which are at present to be found only on reference to a very large number of statutes.

SPENCER G. MAURICE.

NATIONAL INSURANCE ACT, 1959 AND THE EFFECT ON PRIVATE PENSION SCHEMES

Prepared by Price Forbes (Life and Pensions), Ltd., Incorporated Insurance Brokers, London

The first legislation to provide state pensions at a reasonable subsistence level was passed in 1946 when the pensions were fixed at 26s. per week for single men and 42s. per week for married men, the weekly contributions being 4s. 7d. by the employee and 3s. 10d. by the employer. Various increases were made in those figures and prior to the National Insurance Act, 1959, they stood at 50s. per week pension for single men and 80s. per week for married men with corresponding weekly contributions of 9s. 11d. by the employee and 8s. 3d. by the employer.

The National Insurance Act, 1959

The 1959 Act becomes effective as from April, 1961, and it introduces a number of changes in the pattern of state pensions which are fundamental in character although at the moment they are very modest in amount. There will be a minimum contribution covering all employees earning up to £9 per week in order to secure the flat rate pensions and benefits. Those earning over £9 a week, and their employers, will also pay a graduated contribution —4¼ per cent. of earnings over £9 and up to £15 a week—and qualify for a graduated addition to their retirement pension depending on the amount of graduated contributions paid.

Under the changed financial structure of the National Insurance Scheme income and expenditure will be brought broadly into balance. Since the cost of pensions for an increasing number of retirement pensioners will rise steadily over the next twenty years, provision is made for increasing contributions at four five-yearly intervals during this period, should this prove necessary, without increases in the resultant benefits. The taxpayer will bear a share of the cost. The contribution to the National Insurance Fund from the Exchequer, subject to a minimum payment of £170 million a year, will equal one-quarter of the contributions paid by employers and employed persons up to the level of the minimum contributions plus one-third of the amount of self-employed and non-employed

contributions. The five-yearly increases mentioned above would attract proportionate Exchequer contributions in the same way.

The collection of graduated contributions is planned to start in April, 1961. Collecting these contributions in association with P.A.Y.E. income tax will involve employers in considerable reorganisation, the greatest difficulty for the employer with a large labour force being the collection of the graduated contributions which vary with earnings and with the size of a particular employee's pay packet each week.

Everyone over the age of 18 who is employed (that is insured in Class 1) and who has earnings above £9 in any week and is not contracted out as a member of an approved occupational pension scheme must be included in the new graduated scheme. This includes married women and people over the minimum pension age (65 for men, 60 for women) who have not retired and are under age 70 (65 for women). Those who are self-employed or non-employed will not pay graduated contributions or earn a graduated addition to their pensions. They will continue to pay contributions at the *present rates* for the present flat-rate pension and benefits. They will, however, be affected by the five-yearly increases in contributions mentioned earlier.

Examples of the rates of contribution under the old and new schemes are as follows:

Earnings per week	*National Insurance contributions per week*					
	Old Scheme			New Scheme		
	Employee	*Employer*	*Total*	*Employee*	*Employer*	*Total*
Males	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.
£9 and under	9 11	8 3	18 2	8 4	7 0	15 4
£10	9 11	8 3	18 2	9 2	7 10	17 0
£11	9 11	8 3	18 2	10 0	8 8	18 8
£12	9 11	8 3	18 2	10 10	9 6	20 4
£13	9 11	8 3	18 2	11 9	10 5	22 2
£14	9 11	8 3	18 2	12 7	11 3	23 10
£15 and over	9 11	8 3	18 2	13 5	12 1	25 6
Females						
£9 and under	8 0	6 9	14 9	7 2	6 4	13 6
£10	8 0	6 9	14 9	8 0	7 2	15 2
£11	8 0	6 9	14 9	8 10	8 0	16 10
£12	8 0	6 9	14 9	9 8	8 10	18 6
£13	8 0	6 9	14 9	10 7	9 9	20 4
£14	8 0	6 9	14 9	11 5	10 7	22 0
£15 and over	8 0	6 9	14 9	12 3	11 5	23 8

With particular reference to the table of male contributions above, it will be seen that the new scale means a reduction in contribution in respect of the lower-paid employees (up to £9 per week earnings) of 1s. 7d. per week by the employee and 1s. 3d. per week by the employer moving to an increase in contributions in respect of the higher-paid employees (£15 per week earnings and over) of 3s. 6d. per week by the employee and 3s. 10d. per week by the employer.

The existing flat pensions are to be increased in respect of employees earning over £9 per week by amounts which vary with earnings and also with length of contributing service *after* the new Act comes into force. This latter provision means that it may well be many years before the graduated part of state pensions becomes of material size. Even for higher-paid male employees (*i.e.*, £15 per week and over) graduated pensions build up at the rate of only £2 6s. 2d. per annum for each year's contributions which means, for example, that employees retiring in 1970 receive a maximum extra pension of only £20 per annum. Further examples of the scale of additional pensions are as follows:

Earnings per week	Graduated yearly pensions for each year of future contributions.
MALES	£ s. d.
£9 and under	Nil
£10	7 8
£11	15 4
£12	1 3 0
£13	1 10 10
£14	1 18 6
£15 and over	2 6 2

In addition the graduated pension benefit will increase the widow's pension benefit after age 60 under the National Insurance Scheme.

The minimum contribution, and the higher flat-rate contribution of those contracted out of the graduated part of National Insurance pensions, will be paid by the present method of stamping cards (or in other approved ways by large employers). The graduated contribution will be collected in association with P.A.Y.E. income tax.

The graduated part of the pension will be subject to the usual condition of retirement and initially will be subject to the same earnings rules as the flat-rate retirement pension.

People who postpone retirement beyond age 65 (60 for women) will be able to earn extra graduated pension for the time when they do retire or reach age 70 (65 for women) whether retired or not. Until then they will, if they are earning more than £9 a week, continue to pay graduated contributions which will count for graduated pension in the ordinary way. In addition the graduated part of the pension which they would have drawn if they had retired at age 65 (60 for women) will be treated as if it were a graduated contribution paid by the contributor and his employer—that is, half of it will count as an extra contribution by the employee towards further graduated pension, the other half count as the employer's matching contribution. This extra graduated pension is on top of the additions to the flat-rate pension earned by postponed retirement.

Contracting Out

A person can be contracted out of the graduated part of National Insurance retirement pensions if he is in an employment covered by an adequate occupational pension scheme. Contracting out will depend upon four requirements:

(a) that the occupational scheme is financially sound;

(b) that it provides a pension, at or before 65 (60 for women), at least equal to the maximum graduated pension which could be earned in the National Insurance scheme over the same period. This means that whatever the employee's actual earnings, his occupational pension must be at least as high as a man earning £15 a week over the same period of employment would get by way of the graduated part of the retirement pension under the National Insurance Scheme;

(c) that pension rights up to this level are preserved in one way or another should the employee leave his job. The transferable pension rights must be in the form of a non-commutable and non-assignable annuity. Similarly, when making allowance for these transferred pension rights they must not be affected by the exercise of a widow's pension option such as is available under most occupational pension schemes. (It will be seen therefore that if contracting out is to be considered then substantial alterations to an occupational pension scheme will be necessary.)

(d) the agreement of a substantial proportion of employees is necessary.

It is permissible for some employees to be included in the new state scheme and others to be contracted out, provided that the

two classes can be properly defined. In addition, a decision for or against contracting out is not irrevocable. An employer may change his mind at a later date, as he might wish to do if his circumstances altered or if a change were made in the National Scheme.

The factors which will influence an employer in deciding whether or not to contract out may be divided into three classes, financial, administrative and political. His choice is made more difficult by the fact that although the financial facts can be measured and some of the administrative difficulties assessed, the political issues are open to speculation.

Financial considerations

The financial effect of the new provisions varies considerably according to the earnings of the employees concerned, and it is convenient, therefore, to consider the lower-paid employees separately from the higher paid, a suitable dividing line being earnings of £12 per week.

Lower paid employees

For employees who are contracted out, the old rates of contribution continue to be payable. Reference to the table above shows that, by contracting in, the extra pensions under the new scheme are actually coupled with a reduction in contributions for earnings of £10 per week; cost practically nothing at earnings of £11 per week; and cost only 2s. 2d. per week at £12 per week. Up to that level the graduated scheme clearly gives a "good bargain."

Taking all employees earning up to £12 per week as a group, the employer under the new scheme is likely to pay less for them, and might save on the average anything up to 3d or 4d. per week per employee compared with what he is paying now (depending on the earnings distribution in the group), even although the employees would receive the extra graduated pensions.

If, in spite of this, an employer wished for other reasons to contract out these employees, he would sacrifice the saving just mentioned, and he might also have to face a considerable extra cost. The employees might feel that their own state contributions should not be higher than if they were contracted in, which would cost the employer on the average another 10d. or so per week per employee to supplement the employees' own contributions. If he also provided extra pensions under the private scheme equal to the new state benefits, there would be a further cost of perhaps 1s. per week per employee. Finally, there would be extra expense

in providing the graduated state pension at the £15 per week level of earnings for each employee who left the service.

On a purely financial basis, therefore, there are obvious reasons for contracting in the lower paid employees (up to £12 per week earnings) and allowing them to have the extra state benefits without altering the existing private occupational scheme.

Higher paid employees

As regards the higher paid employees, some further investigation is required. If an employer feels that he is already providing adequate pensions under the private occupational scheme and therefore contracts out without altering his scheme, there will be a saving in state contributions as compared with contracting in, the amount of the saving depending on the earnings distribution of the employees concerned. Suppose, for example, we assume as an average distribution of earnings the figures shown in the following table:

Earnings per Week	No. of Employees	Employer's Weekly Saving per Employee
		s. d.
£13	20	2 2
£14	20	3 0
£15 and over	60	3 10
	100	

For this particular distribution the savings shown in the third column result in an average saving to the employer of 3s. 4d. per week per employee. The employees' own savings follow from the figures given in our table, *i.e.*, between 1s. 10d. per week and 3s. 6d. per week, depending on earnings.

This is not quite the full picture, because, if he contracts out, the employer has to provide every employee who leaves the service before retirement with a pension equal to the maximum graduated state pension at the £15 per week level of earnings. The extra cost of making this special provision for employees leaving the service depends entirely on labour turnover, but if we assume a 5 per cent. rate of withdrawal per annum after average period of service of two years, the cost could be measured as about 10d. per week for each of the employees in the higher paid group being considered, shared equally between employer and employee under a contributory scheme.

The employer's net saving, therefore, for male employees earning over £12 per week would average about 2s. 11d. per week per

employee if he contracts out, as compared with contracting in, the private occupational scheme being left unaltered in each case.

The above comparison does not compare like with like since in one case the employees receive only the present private scheme pensions whereas in the other they receive in addition the new graduated state pensions.

A truer comparison is shown if, for a contracted out scheme, we take account of the commercial cost of the graduated state pensions. This cost would come out of the employer's saving in state contributions and any balance left over would be the true net saving, the employees receiving the same total pensions in each case.

The commercial cost would depend on the ages of the employees concerned and in the following table figures are shown for average ages forty and forty-five. It has also been assumed that the overall cost is shared equally between employer and employees, and allowance has been made for widows' state pensions.

Assumed average age of employee	Employer's saving in weekly state contributions per employee if contracted out	Employer's share of commercial cost of state benefits per employee	Employer's net weekly saving per employee
	s. d.	s. d.	s. d.
40	2 11*	1 10*	1 1
45	2 11*	2 3*	8

* After allowing for the effect of withdrawals.

For most schemes the average age lies between 40 and 45 and the employer's net weekly saving may, therefore, be taken as about 11d. per week per employee in the high earning group if, instead of contracting in, he contracts out and in addition provides the graduated state pensions commercially.

As regards employees, it was stated above that the saving in state contributions would vary between 1s. 10d. per week and 3s. 6d. per week depending on earnings. An individual employee's share of the commercial cost of the graduated state pension (corresponding to the average figure for the employer's share in the third column above), would normally be less than these amounts.

In conclusion, for the lower paid employees the financial considerations point to contracting in, since the additional state pensions can be provided with lower contributions overall than at present. For the higher paid employees, contracting out is likely to be cheaper to the employer than contracting in by about 2s. 11d. per week per employee if the private scheme is left unaltered, or by about 11d. per week per employee if allowance is made for the commercial cost

of the graduated state pensions. These figures are perhaps lower than might have been expected, and it must be emphasised that the other factors considered below are at least as important as the purely financial results in deciding whether to contract out or not.[1]

Administration

Detailed comments must await the publication and study of all the Ministry regulations, but some general comments can be made:

Contracting out will involve certain changes in the rules of the private scheme, although the Ministry intends to simplify these as much as possible.

The administration of P.A.Y.E. will be simpler for contracted out employees, since National Insurance contributions will not vary with earnings. All employees, however, could not be contracted out since new employees would require to be members of the state scheme until they became eligible to join the private scheme. For this reason at least two different sets of National Insurance contributions would have to be dealt with. In addition, contracting out involves a number of complications for the employer in providing the statutory paid up pensions for employees leaving the service.

Any course which involves an alteration in the private scheme benefits will require a good deal of work, although this will be non-recurring.

Since it might be considered inappropriate to adjust a private scheme by the relatively small state pensions involved, there may be a tendency for employers who feel that there is scope for an increase in pension provisions over the existing level (state and private combined) to contract in.

Political

It is unfortunate that political considerations should have to be weighed when making a decision as to the future of a company's private occupational pension scheme, but it would be unwise to ignore them altogether. The main parties differ greatly in their views as to the part to be played by the National Scheme. Whilst one side favours a much more substantial plan and has different ideas on the conditions under which contracting out should be allowed the other has produced this new graduated scheme under

[1] The foregoing financial analysis excludes the four five-yearly increases in contributions which are provided for in the new Act. For contracted in employees each of these increases amounts to ¼ per cent. of the appropriate earnings, but for all contracted out employees irrespective of earnings the ¼ per cent. is calculated on earnings of £15 per week. Because of this latter provision these increases will reduce the saving where a scheme has been contracted out.

which the benefits are, to say the least, no more than at a subsistence level. One should consider whether the present graduated scheme will be extended or whether other governments might make contracting out more onerous that at present.

Should an employer wish to contract out he must first notify his employees and allow a period for consultation before applying to the Registrar for a certificate. Where the Registrar is aware of any representations made by employees against contracting out he may defer the issue of the certificate so that the matter can be considered in the light of the representations.

RENTCHARGES IN REGISTERED CONVEYANCING—II

By Theodore B. F. Ruoff, Solicitor

(3) THE PROCESS OF FIRST REGISTRATION OF RENTCHARGES

Properly Advised Purchasers

The title deduced in support of an application for first registration of a rentcharge should be such as a willing purchaser or grantee, acting under competent professional advice, could properly be advised to accept and the evidence of it should be prepared for registration as if it were being prepared for examination by a purchaser or grantee. In addition to supplying a properly verified abstract of title, full information should be given on any point regarding which a well advised purchaser or grantee would raise requisitions so that, for example, all overriding rentcharges should be disclosed in the schedule of incumbrances printed within the application form and evidence of them lodged.[1] The possibility that the title or any part of it may already be known to the Registry should be ignored: each application must stand on its own merits. It will be appreciated that until a definite application for registration is made, accompanied by the appropriate deeds and documents, the Chief Land Registrar is not prepared to express any opinion about a particular title, whether as regards its length, or the form or sufficiency of any document or otherwise. But inquiries regarding Land Registry practice may always be addressed to the Registry before a formal application for registration is actually lodged.

Restrictions and Other Entries

The applicant's solicitor is required to state in the application form the nature of his client's ownership as, for example, that the applicant is entitled for his own benefit to the rentcharge, or, if there is more than one applicant, whether or not they are jointly and beneficially entitled and whether by law the survivor will have power to give a valid receipt for capital on a disposition, or that the applicant is a tenant for life, or a person having the powers of a

[1] See p. 21, *ante*.

tenant for life, or that the applicants are statutory owners, personal representatives, trustees for sale, or the trustees of a named charity.[2]

If the estate of the applicant for first registration is or may be subject to a restraint on alienation, the Chief Land Registrar is required to enter on the register a restriction protecting any such restraint in such manner and form as he thinks fit.[3] In other words, if, under the general substantive law governing real property, the applicant does not possess plenary powers of disposition, that situation must be reflected by the entry of an appropriate restriction,[4] because, so long as there is no entry to the contrary on the register, a registered proprietor can enter into any dispositions he likes which the law allows and they will be completed by registration.[5]

As the register of title exactly reflects the state of the title of the applicant for first registration, all incumbrances, conditions, and other burdens (including prior rentcharges) to which the rentcharge being registered may be subject, must be entered on the register and may be entered either directly, or by reference to the instruments by which they are created, or by setting out extracts therefrom.[6]

The Register and Filed Documents

Simplicity is one of the chief characteristics of registered conveyancing. In relation to the registration of the title to rentcharges, the advantage of the cardinally simple character of the register is more than ever realised, for it presents, at a glance, the broad picture of ownership, with its limitations and incumbrances. At the same time, full, uncluttered information about every detail of these limitations and incumbrances is easily accessible, because the entries on the register are so framed as to throw the reader (that is, the registered proprietor, or a potential purchaser or other interested person), upon the documents which contain the material facts. The original or duplicate deeds or a verified copy or abstract of them are available for inspection in the hands of the registered proprietor, whilst verified copies or abstracts of them are also filed in the Registry so that they may be inspected on the written permission of the registered proprietor [7] without delay. In addition, office copies of

[2] Being estate owners within the meaning of the Land Registration Act, 1925, s. 4.
[3] Land Registration Rules, 1925, r. 39.
[4] Under the Land Registration Act, 1925, s. 58.
[5] See, *e.g.*, *ibid.* s. 18.
[6] Land Registration Rules, 1925, r. 40.
[7] Land Registration Act, 1925, s. 112; Land Registration Rules, 1925, r. 287.

them may (with the like permission) be obtained,[8] and are completely authoritative.[9] The essential simplicity of the register will hereafter be exemplified.[10]

Examination of Title

When the applicant's solicitor has applied for his client to be registered with an absolute title, the title shown by the documents accompanying the application are examined by the Registry's staff under the superintendence of the Chief Land Registrar. He is empowered to make such searches and inquiries and to give such notices to tenants and occupiers and other persons as he deems expedient.[11] In particular, he is required, before he completes the registration of a rentcharge with an absolute or qualified title, to notify certain persons.[12]

Good Holding Title

A fundamental feature of registered conveyancing is its curative powers and this is demonstrated by in the fact that if the Chief Land Registrar, upon his examination of any title, is of the opinion that the title is open to objection, but is nevertheless a title the holding under which will not be disturbed, he may approve it. Alternatively (although he has never yet done so), he may require the applicant to apply to the High Court, upon a statement signed by him for its sanction to the registration.[13] If, in the result, the applicant is registered with an absolute title, there is thereafter a guarantee by the state that the rentcharge is vested in him subject to such entries as appear on the register (and subject, of course, to overriding interests),[14] but otherwise free from all other adverse estates and interests.[15] But, as mentioned previously, if there are defects of title which cannot, in the opinion of the Chief Land Registrar, be cured immediately by the process of registration, the applicant may become registered with a less effectual class of title, known as a qualified title.[16]

Complicated Titles

In considering the title deduced by the applicant, the Chief Land Registrar has certain powers which will hereafter be considered

[8] Land Registration Rules, 1925, r. 296.
[9] Land Registration Act, 1925, s. 113.
[10] See p. 117, *post*.
[11] Land Registration Rules, 1925, r. 25.
[12] See p. 104, *post*.
[13] Land Registration Act, 1925, s. 13, proviso (c).
[14] Defined *ibid*. s. 3 (xvi).
[15] *Ibid*. s. 5; and see the Land Registration Rules, 1925, r. 50.
[16] See p. 15, *ante*.

more particularly in relation to the first registration of corporeal land which is encumbered with rentcharges.[17] Such a title is usually far more complicated than the title to a rentcharge. The powers in question are those of referring a title to one of the Conveyancing Counsel to the Court,[18] or to an expert on the subject of rentcharges,[19] or (in areas in which registration of title is not compulsory on sale) of charging extra fees for work involving a specially complicated title [20] or involving exceptional knowledge.[21] These additional fees cannot be charged to an applicant without his previous consent.[22]

Advertisement and Objections

Before the registration of any rentcharge is completed with an absolute title, an advertisement must be inserted by the Registry in the *Gazette* and in such local or other newspapers as the Chief Land Registrar may decide.[23] This advertisement must give the name and address of the person to be registered, a short description of the rentcharge and of the situation of the land out of which it issues, and it must require objections to the proposed registration to be made before the expiration of a stated period, being not less than fourteen days from the appearance of the advertisement.[24]

The Chief Land Registrar is also required to give notice in writing of the proposed registration to the reputed owner of the land out of which the rentcharge issues and he may, in his discretion, give notice to other persons also.[25] Allowing for the time taken in the post,[26] a total period of 21 days is allowed for objection.[27]

After the issue of advertisements and notices any person may, by notice in writing, signed by himself or his solicitor and delivered at the Registry, object to the registration at any time before it has been completed.[28] The notice must state concisely the grounds of the objection and give an address in the United Kingdom of the person objecting, to which all notices and other communications for him may be posted.[29] If an objection is received, the Chief Land Registrar must give notice of it to the applicant, and his

[17] See p. 116, *post*.
[18] Land Registration Rules, 1925, rr. 26, 303.
[19] *Ibid.* r. 304.
[20] Land Registration Fee Order, 1930, Fee Order Rules, r. 5.
[21] *Ibid.* r. 8.
[22] *Ibid.*
[23] Land Registration Rules, 1925, r. 31; but see r. 33.
[24] *Ibid.* r. 32.
[25] *Ibid.* r. 55 (*a*).
[26] *Ibid.* r. 313 (1).
[27] *Ibid.* r. 312.
[28] *Ibid.* r. 34 (1).
[29] *Ibid.* r. 34 (2).

rentcharge may not be registered until the objection has been withdrawn or otherwise disposed of.[30] The applicant has the right to obtain an appointment before the Chief Land Registrar for the hearing of any objection and the objector must be given at least seven clear days' notice of that appointment.[31]

In regard to hearings generally before the Chief Land Registrar it is provided[32] that if any question, doubt, dispute, difficulty or complaint arises upon any application for first registration or any investigation of title (whether such questions relate to the construction, validity, or effect of any instrument, or the persons interested, or the nature or extent of their respective interests or powers, or as to priorities, or as as to the mode in which any entry should be made or dealt with in the register or otherwise), the Chief Land Registrar must hear and determine the matter and, subject to an appeal to the High Court, make such order in the matter as he shall think just. But he may, if he thinks fit, instead of deciding the question himself, refer the matter at any stage, or any question thereon, for the decision of the High Court.[33] Moreover, any person aggrieved by an order or decision of the Registrar may appeal to the High Court.[34] Nowadays, the Court of Chancery of the County Palatine of Lancaster has a similar jurisdiction over property and persons within the County Palatine.[35]

Completion of Registration

Finally, when any objections that have been made have been disposed of, and the time fixed by advertisements and notices has expired, and the Chief Land Registrar has determined the class of title with which the registration is to be made, the registration is completed as of the day on which, and of the priority in which, the application was delivered. The rentcharge certificate (as the certificate of title issued to the rentowner is called) and the documents of title, other than those which have to be retained in the Registry, are then delivered to the applicant.[36] The duplicate or original deed which created the registered rentcharge and the latest document of title, before being issued, are officially marked in indelible ink with the title number under which the rentcharge is registered so

[30] *Ibid.* r. 35 (1).
[31] *Ibid.* r. 35 (2).
[32] *Ibid.* r. 298 (1).
[33] *Ibid.* r. 298 (2).
[34] *Ibid.* r. 299.
[35] Land Registration Act, 1925, s. 138 (1). *Cf.*, *ibid.* s. 3 (ii). And see the Chancery of Lancaster Act, 1890, s. 3, and the Land Registration Rules, 1956 (S.I. 1956 No. 1024), r. 1.
[36] Land Registration Rules, 1925, r. 42.

as to give notice of the fact of registration to purchasers and other persons dealing with the land.[37]

Normal Entries on the Register

The example set out below shows the normal way in which the property register of a rentcharge title is prepared in the Registry to show the proper description of the rentcharge.[38] In this example there is—as is commonly the case in the north of England—an overriding rentcharge (referred to in the third note of the register). Also exemplified is that rarity, a formal apportionment. It will also be observed that if the mines and minerals lying under the land out of which the rentcharge issues have been severed, that fact is recorded. Finally, if the title of the charged land is registered, the register of the rentcharge title contains a reference to its title number. There is a similar cross-reference on the register of the title to the land. Thus there is some analogy with book-keeping in the entries made on the register. The property register of the rentcharge title may be regarded as a credit entry whilst the entry of the rentcharge as an incumbrance in the charges register of the title to the land[39] constitutes a debit entry.

A. PROPERTY REGISTER Title P. 00001

County or County Borough	Parish or Place
Blankshire	Blackport

A PERPETUAL YEARLY RENTCHARGE of £10 9s. 8d. (registered on 2 February, 1960) payable half-yearly on 25 March and 29 September created by a Conveyance[40] dated 1 April, 1906 and made between (1) Timothy Tulk (Vendor) (2) Percy Pickersgill and Pauline Pickersgill and (3) Alexander Austerbury (Purchaser). The registered rentcharge is charged upon and issues out of the FREEHOLD LAND shown and edged with red on the plan of the above title filed at the Registry known as 2–30 (even Nos. inclusive) Warringdale Road.

Note 1: Duplicate Conveyance issued with certificate: abstract filed.

Note 2: The land charged is registered under title No. P. 00075.

Note 3: The land out of which the registered rentcharge issues is, with other land, subject to a prior yearly rentcharge of £3 4s. 5d. created by a Conveyance dated 2 May, 1850, and made between (1) Rupert Reckitt and (2) Ernest Elliston (abstract filed; abstract issued with certificate; abstract filed). The Conveyance dated 1 April, 1906, (referred to above) contains a covenant by the Vendor indemnifying the land from payment of the said rentcharge of £3 4s. 5d. and a power for the Purchaser to retain the registered rentcharge in case of default.

Note 4: All mines and minerals under the land charged are excluded.

[37] Land Registration Act, 1925, s. 16.
[38] Land Registration Rules, 1925, rr. 3, 5 (2).
[39] See p. 118, *post*.
[40] For the terminology used on the register, see p. 11, *ante*.

Note 5: By a Deed dated 16 May, 1954, and made between (1) Catherine Cadogan (2) Ernest Elliston and (3) Michael Moxhay the registered rentcharge was formally apportioned as follows:
As to 10 Warringdale Road, £1 10s. 6d.
As to 12 Warringdale Road, £1 10s. 6d.
As to the remainder of the land out of which it issues, £7 8s. 8d.

Composite Rentcharge Title

If several rentcharges are conveyed to an applicant for first registration by a single deed, they will all, for the sake of convenience, be included in a single title, so long as the charged lands are all contiguous. In a simple case, the descriptions of the rentcharges in the property register of the title will appear thus:

A. PROPERTY REGISTER Title P. 00002

County or County Borough	Parish or Place
Blankshire	Oldley

TWO PERPETUAL YEARLY RENTCHARGES (registered on 3 May, 1959) created by the Conveyances described below and charged upon and issuing out of the FREEHOLD LAND shown and edged with red on the plan of the above title filed at the Registry of which the following are short particulars:

Rentcharge	*Land out of which rentcharge issues and reference on filed plan*	*Date and parties of conveyance creating rentcharge*	*Remarks*
£1 2s. 3d. payable half-yearly on 25 March and 29 September.	2 to 22 (even numbers) Salchester Street, tinted pink on the filed plan and registered under title No. P. 00743.	(1) Cecil Cody (2) Bertram Ballard.	Abstract issued with certificate: abstract filed.
£4 5s. 6d. payable half-yearly on 30 June and 31 December.	5 to 10 (inclusive) Rochport Street, tinted blue on the filed plan.	(1) William Walsh (2) Peter Potts and Phillipa Potts (3) Francis Finucane.	Original Conveyance issued with certificate: copy filed.

Terminable Rentcharges

When a terminable rentcharge issues out of freehold land, the property register of the rentcharge title will contain these typical entries:

A. PROPERTY REGISTER Title P. 00003

County or County Borough	Parish or Place
Blankshire	Lanburn

A TERMINABLE YEARLY RENTCHARGE of £6 3s. 6d. (registered on 2 February, 1960) payable half-yearly on 31 March and 29 September, created by a Conveyance dated 3 January, 1960, made between (1) Reginald Rouchefoucald (2) Sally Sugden and Daniel Derry and (3) Mark Morgan. The registered rentcharge

is charged upon and issues out of the FREEHOLD LAND shown and edged with red on the plan of the above title filed at the Registry known as 71, 72 and 73 Stockaster Street for a term of 99 years from 31 March, 1960.
Note: Original Conveyance issued with certificate; copy filed.

If a terminable rentcharge is effectually created so as to issue out of leasehold land[41] the property register of the title will take this form:

A. PROPERTY REGISTER Title P. 00004

County or County Borough	Parish or Place
Blankshire	Stockcaster

A TERMINABLE YEARLY RENTCHARGE of £6 10s. (registered on 3 January, 1960) payable half-yearly on 30 June and 25 December created by a Deed of Grant dated 1 January, 1960, made between (1) Alexander Austerbury (2) Frederick Fawcett. The registered rentcharge is charged upon and issues out of the LEASEHOLD LAND shown and edged with red on the plan of the above title filed at the Registry known as 305 Warringdale Road for the residue of the term created by the lease of which the following are short particulars:

		Term		
Date	*Parties*	*Years*	*From*	*Rent*
31.1.1959	(1) Peter Potts (2) Alexander Austerbury	99	31.1.1959	£5

Note 1: Original Deed of Grant and copy of lease issued with certificate; copies filed.
Note 2: The registered rentcharge is subject to all obligations and liabilities incident to the leasehold term.[42]

Apportioned Part of Rentcharge

As stated earlier,[43] the title to part of a rentcharge may be registered if it has been formally apportioned. The following example contains a typical description for the property register of a rentcharge title in the case of a formal apportionment and it will be observed that there is no reference (for none is necessary) to the remainder of the rentcharge.

A. PROPERTY REGISTER Title P. 00005

County or County Borough	Parish or Place
Blankshire	Wigham

A PERPETUAL YEARLY RENTCHARGE of £7 17s. (registered on 7 January, 1948) payable half-yearly on 25 December and 30 June being a formally apportioned part of a rentcharge of £90 13s. 6d. created by a Conveyance dated 1 April, 1930, and made between (1) Bertram Baxendale (2) Theodore Thellusson and apportioned by a Deed of Apportionment dated 3 May, 1937 and made between (1) Harold Hadley (2) William Walsh and (3) Bertram Baxendale.

[41] *Re Fraser, Lowther* v. *Fraser* [1904] 1 Ch. 111; [1904] 1 Ch. 375. See p. 11, *ante*.
[42] See the Land Registration Act, 1925, s. 9 (*a*).
[43] See p. 20, *ante*.

The registered rentcharge is charged upon and issues out of the FREEHOLD LAND shown and edged with red on the plan of the above title filed at the Registry known as 217–227 (odd numbers) Boulburn Road.

Note: Copy Conveyance dated 1 April, 1930, issued with certificate: copy filed. Original Deed of Apportionment dated 3 May, 1937, issued with certificate: copy filed.

Instances are sometimes met with in which the applicant for registration states that the rentcharge which he seeks to register is an apportioned part only, but that he has been unable to obtain any evidence of a formal apportionment. In such a case the best that the Registry can do is to register the rentcharge on the evidence available in the normal way and to add a note in the property register of the title to the effect that no particulars of any apportionment were produced on first registration and that it is not known whether the apportionment was formal or informal.

(4) APPLICATION FOR FIRST REGISTRATION OF LAND SUBJECT TO RENTCHARGES

Applications in Normal Form

The method of preparing and presenting to the Registry an application for first registration of corporeal land, out of which one or more rentcharges issue, does not differ materially from any other application for first registration, although the complexity of the subject-matter and the fact that the root of title (referring to the first rentcharge that has been created) may reach back for a long distance into the past, call for special care in deducing title. The normal process of first registration of freehold land is well known and a detailed description of it is outside the scope of the present series of articles. Furthermore, most of what has already been written in relation to the first registration of rentcharges[44] applies to corporeal land. Consequently, the notes that follow are abbreviated.

The form of the application will be the appropriate one of the following,[45] according to the circumstances, and the certificate as to the title incorporated in it must be signed by the applicant's solicitor —not by his clerk—in the name of the firm.

> *Form 1B:* Application by solicitors for registration of a purchaser (other than a company or corporation) of freehold land immediately after his purchase.

[44] See pp. 13 *et seq.*, *ante*.

[45] Obtainable from H.M. Stationery Office at York House, Kingsway, London, W.C.2; 39 King Street, Manchester, 2; 2 Edmund Street, Birmingham, 3; Tower Lane, Bristol, 1; or any other branch; also through any bookseller.

Form 1E: Application by solicitors for registration of a company or corporation as a purchaser of freehold land immediately after the purchase.

Form 1C: Application by solicitors for registration of freehold land—not following a recent purchase. There is a supporting statutory declaration to be made.

Form 1C (Co): Application by solicitors for registration of a company or corporation as the proprietor of freehold land—not following a recent purchase. Here, too, a statutory declaration is required.

Documents in Support of Application

The following documents and evidence must normally accompany an application made in the appropriate one of the above-mentioned forms and should be sent to the Registry by post:

(i) All original deeds and documents relating to the title which the applicant has in his possession or can oblige the holder to produce, including opinions of counsel, abstracts of title, contracts for, or conditions of sale, requisitions, replies, official certificates of search in the Land Charges Department and other like documents. Usually the Chief Land Registrar does not require documents to be produced which affect also other property, or for the production of which a fee has to be paid.

(ii) As in the case of a rentcharge application, in order that satisfactory entries for the register may be framed and for the convenience of all persons concerned, it is desirable that the registered proprietor and the Land Registry should each possess full particulars of all deeds which have created rentcharges and of all deeds which have apportioned them, or exonerated the charged lands from liability. When the original of any such deed is in the applicant's possession, it should be lodged with the application together with a certified copy for filing in the Registry. When the applicant holds only an examined abstract or copy of the deed, an additional examined abstract or copy should be supplied for filing. All abstracts or copies of deeds should be marked by a solicitor as having been verified with the original deeds or with a marked abstract or copy.

(iii) A certified [46] copy of the conveyance or grant to the applicant containing a copy of any plan thereon. A carbon copy of the engrossed deed suffices if it is clear.

[46] As to certification by a solicitor, see the Land Registration Rules, 1925, r. 309.

(iv) Sufficient particulars by plan, or otherwise (if not contained in the conveyance or grant to the applicant), to enable the Land Registry Plans Branch to identify the land on the ordinance map or the Land Registry general map.[47]

(v) When the land has been mortgaged by the applicant,[48] the mortgage or charge must be lodged with a certified copy of it.[49]

(vi) A list in triplicate of all documents delivered.[50]

(vii) The prescribed fee.

Registration and Survey Fees

The fees for first registration are payable under scale 1 on the value of the land.[51] When the application is made within a year of the sale to the applicant, the value will be the amount of the purchase-money.[52] If the descriptions of the land and plans contained in the deeds do not enable the land to be fully identified by the Registry's officials, a survey is usually necessary and, in non-compulsory areas, the applicant is required to bear a part of the cost of the survey.[53] At the present time[54] the minimum sum charged to an applicant is £9 9s. 0d. All fees may be paid by cheque, or postal, or post office, order, drawn to the order of the Commissioners of Inland Revenue.[55]

Separate Application for Rentcharges

If the conveyance to the applicant conveys both freehold land and one or more rentcharges and he wishes to register the title to the rentcharges as well as the land, it is essential that a separate application in the appropriate form[56] should be made in respect of the rentcharges, for in such a case the Registry will not register the title to the rentcharges unless expressly requested to do so.

"Merger" of Rentcharge

In this connection it may be mentioned that, occasionally, when a rentcharge and freehold land have been conveyed by the same deed, an applicant for first registration has misguidedly asked for the benefit of the rentcharge to be entered on the register of the

[47] *Ibid.* r. 20 (iii).
[48] *Ibid.* r. 72.
[49] *Ibid.* rr. 92, 139.
[50] See p. 19, *ante*, for the reason for requiring three copies.
[51] Land Registration Fee Order, 1930, para. I.
[52] *Ibid.* Fee Order Rule 9 (*a*).
[53] *Cf.* the Land Registration Rules, 1925, r. 280.
[54] March, 1960.
[55] Land Registration Fee Order, 1930, Fee Order Rule 2.
[56] *i.e.*, one of forms 1F, 1H, 1G, or 1G (Co).

freehold land. As the rentcharge itself is "land"[57] it cannot, in any sense, be said that the benefit of it attaches to corporeal land. If an applicant owns a rentcharge which constitutes an incumbrance upon his freehold land he may ask for it to be treated as extinguished. Alternatively, in such a case (as also in cases where the rentcharge issues out of land which he does not own) it is open to him to apply for first registration of the rentcharge.

The process by which a rentcharge is extinguished as mentioned above[58] is sometimes loosely described as "merger," although it is doubtful whether that term is apt to describe anything but the absorption or drowning of a smaller estate in land in a greater. Be that as it may, it is clear that merger is always dependent upon the intention of the estate owner[59] so that it does not occur automatically.[60] This is especially true when the question is whether an incumbrance should be kept alive.[61] Consequently, if no intention is expressed, the court will act upon what is most advantageous to the person acquiring the charge or interest.[62] Then again, merger can only take place when the same person owns the two estates or interests at the same time in the same right[63] without any intervening estate.[64] Consequently, when a man owns land subject to a rentcharge as a tenant for life and owns the same rentcharge as beneficial owner, the rentcharge will not, by reason of those facts, be extinguished. Again, if land is held by two persons as joint tenants in equity and a rentcharge issuing out of that land is owned by them as beneficial tenants in common, those facts do not allow a presumption of extinguishment.

Extinguishment as to Part of Land

Extinguishment on "merger" of a rentcharge as to a part only of the land out of which it issues cannot easily come about. It is declared[65] that after August 12, 1859,[66] "a release from a rentcharge of part of the land charged therewith does not extinguish the whole rentcharge, but operates only to bar the right to

[57] Land Registration Act, 1925, s. 3 (viii).
[58] *Freeman* v. *Edwards* (1848) 2 Exch. 732, 739.
[59] *Forbes* v. *Moffatt* (1811) 18 Ves. 384; *Snow* v. *Boycott* [1892] 3 Ch. 110; *Thellusson* v. *Liddard* [1900] 2 Ch. 635.
[60] *Cf.* the Law of Property Act, 1925, s. 185.
[61] *Watts* v. *Symes* (1851) 1 De G.M. & G. 240.
[62] *Thorne* v. *Cann* [1895] A.C. 11 at p. 18. See also *Adams* v. *Angell* (1876) 5 Ch.D. 634; *Ingle* v. *Vaughan Jenkins* [1900] 2 Ch. 368; *Re Betton's Trust Estates* (1871) L.R. 12 Eq. 553; *Swinfen* v. *Swinfen* (*No.* 3) (1860) 29 Beav. 199; *Re French-Brewster's Settlements* [1904] 1 Ch. 713.
[63] *Re Radcliffe* [1892] 1 Ch. 227.
[64] *Burton* v. *Barclay and Purkins* (1831) 7 Bing. 745 at pp. 756, 757; *Re Chance's Settlement Trusts* (1918) 62 S.J. 349.
[65] Law of Property Act, 1925, s. 70 (1). [66] *Ibid.* s. 70 (2).

recover any part of the rentcharge out of the land released, without prejudice to the rights of any person interested in the land remaining and unreleased, and not concurring in or confirming the release." Thus, if the owner of the unreleased land so consents, the whole rentcharge may be imposed upon his land [67] and may thus be treated as extinguished as to the remaining land. If he does not consent, however, only a proportion of the rentcharge may be recovered from his land.[68] These things being so, if it appears at the time of first registration that an entire rentcharge and also part of the land subject to it have come into the same hands the Registry will not assume that " merger " has occurred, even if the applicant's solicitors have so assumed, and even if it is possible for it to have occurred at law. If effect is to be given on the register to a partial " merger " the four conditions following must usually be fulfilled. It must be proved that:

(a) The rentowner owns part of the land charged at the same time and in the same right as he owns the entire rentcharge.

(b) There is a declaration in some deed of an intention to extinguish the rentcharge as to part of the land.

(c) The owner of the land which the rentowner has *not* acquired concurs in the application.

(d) The applicant's solicitor should either expressly seek merger or should do so impliedly as, for example, by omitting any reference to the rentcharge in the deed inducing registration.

When the Chief Land Registrar is satisfied that merger of an unregistered rentcharge has taken place and an application is made at the time of first registration of the land to treat it as extinguished, the deed by which it was conveyed to the registered proprietor of the land is officially marked in the Registry with the words " Rentcharge determined." So also is the deed creating the rentcharge if it is available.

Rentcharge: A Legal Interest

From time to time cases occur in which a full thirty years' title to land, commencing with a good root of title, has been deduced without revealing the existence of a rentcharge created before the date of the root of title. Sometimes, a reference back to restrictive covenants created by a deed, earlier in date than the root of title, uncovers the existence of the rentcharge. In any such case it should be borne in mind that a rentcharge is a legal interest [69]

[67] *Price* v. *John* [1905] 1 Ch. 744.
[68] *Booth* v. *Smith* (1884) 14 Q.B.D. 318.
[69] Law of Property Act, 1925, s. 1 (2) (*b*).

and, hence, that its enforceability against land in the hands of a purchaser does not in the slightest depend upon the equitable doctrine of notice. Therefore the Registry invariably notes any such rentcharge as an incumbrance on the register unless strict evidence of its extinguishment has been supplied.

For a similar reason, when registering the title to land in areas in which rentcharges are exceedingly common, and it appears to the Chief Land Registrar that the deeds have been lost or destroyed, or the application for first registration is founded upon squatting, the following entry will be made in the charges register of the title:

"The deeds and documents of title having been destroyed by enemy action [*or*, The title to the land having been acquired by adverse possession; *or as the case may be*] the land is registered subject to such restrictive covenants as may have been imposed thereon and to such rentcharges as may have been created thereout before [*date of first registration*] so far as the same are enforceable."

The reason for referring also to the possibility of there being restrictive covenants is that, owing to the absence of deeds, the purchaser will have been unable to carry out a normal investigation of title,[70] but yet will be deemed to have constructive notice of such covenants as would have been disclosed if he had been able to make that investigation.[71]

Kinds of Title

Freehold land may be registered with one of three possible classes of title, namely, an absolute, a possessory or a qualified title. The effect of registration with each class has been described previously.[72] In the compulsory areas, an absolute title is granted in respect of more than 99 per cent. of the applications made and in the non-compulsory areas the percentage is but little lower. A qualified title, which is occasionally apt in the case of a rentcharge, is scarcely ever granted in respect of corporeal freehold land. Possessory titles, on the other hand, are granted in two differing sets of circumstances. First, when such title as the applicant has is entirely dependent upon actual occupation of the land, or upon receipt of the rents and profits arising from it, and not upon any documentary title[73]; and secondly, when the documentary title

[70] *Ibid.* s. 44.
[71] *Re Cox and Neve's Contract* [1891] 2 Ch. 109.
[72] See p. 13, *ante*.
[73] Land Registration Rules, 1925, r. 37; see the Land Registration Act, 1925, ss. 3 (xviii), 4, proviso (ii).

which an applicant deduces is seriously weak or defective and yet he is clearly in possession, or in receipt of the rents and profits. If a possessory title is sought, the Chief Land Registrar may nevertheless register the title as absolute,[74] and, on the other hand, if an absolute title is sought, but the Chief Land Registrar does not approve of the title deduced, he may register it as possessory,[75] and there is no appeal from his decision.[76]

Possessory Title: Restrictive Covenants and Rentcharges

When granting a possessory title the Chief Land Registrar must have regard to the likelihood that it will be converted to an absolute title within a short period of years[77] and consequently, in cases where no documentary title, or only a short documentary title, has been deduced, he must consider, on the one hand, the fact that the registered proprietor of an absolute title takes free from all restrictive covenants which are not noted on the register,[78] and, on the other hand, the likelihood that there may exist restrictive covenants which are enforceable, although undisclosed, through lack of a full investigation of title.[79]

Difficult or Exceptional Problems

Some complex problems may arise on the examination of a title to land which is subject to a number of successive rentcharges. In any such case the Chief Land Registrar may refer the whole or any portion of the examination of the title for the opinion of one of the special conveyancing counsel, and may act on his opinion.[80] These counsel are the Conveyancing Counsel to the High Court, and such other barristers experienced in conveyancing as the Lord Chancellor from time to time appoints. The business referred to them is distributed in rotation.[81] It is provided that matters affecting a title which have already been dealt with by one of the Conveyancing Counsel shall, so far as practicable, be referred to the same counsel, although the Chief Land Registrar may, if he thinks fit, under special circumstances, direct or transfer a reference to any one in particular of the Conveyancing Counsel.[82] Nevertheless, if, before first registration, a title has already been

74 Land Registration Act, 1925, s. 4, proviso (iii).
75 *Ibid.* s. 4, proviso (i).
76 *Dennis* v. *Malcolm* [1934] 1 Ch. 244.
77 Land Registration Act, 1925, s. 77.
78 *Ibid.* s. 5.
79 See p. 114, *ante.*
80 Land Registration Rules, 1925, r. 26.
81 *Ibid.* r. 303 (1).
82 *Ibid.* r. 303 (2).

examined on a sale by counsel of not less than seven years' standing, the Chief Land Registrar may act on his opinion, or he may refer the application to him for further consideration and act on his further opinion.[83] Again, if a question arises which, in the opinion of the Chief Land Registrar, involves for its determination some exceptional knowledge of a particular branch of the law which rarely arises for consideration, the Chief Land Registrar may obtain the advice or assistance of any competent person whom he may select, and may act upon his opinion.[84] This provision has been called in aid in connection with problems touching rentcharges on several occasions.

If, owing to the nature of the title, or for any other reason, an application for first registration in a non-compulsory area causes an unusual amount of work or cost in the Registry, the Chief Land Registrar has power to direct the payment of an additional fee in view of the work or cost involved, but notice of any additional fees which may become so payable will always be served on the applicant before he incurs any liability.[85] Again, if, in the course of any proceeding (whether affecting land in a compulsory or a non-compulsory area), the Chief Land Registrar consults counsel, or applies to a solicitor or other person (other than the applicant or his solicitor, agent or servant) to produce a document, certificate or plan, or to supply a copy thereof, or to do any act or to furnish any information, or to prepare any title for registration, or if he directs the service of a notice, the publication of an advertisement, or the making of a survey, journey or inquiry, the costs so incurred must be defrayed by the applicant unless an order to the contrary is made by the Chief Land Registrar. But no applicant will become chargeable with costs so incurred without his consent.[86]

Completion of the Registration

As mentioned previously in connection with the registration of the title to rentcharges, the Chief Land Registrar possesses a power, which he is not slow to exercise, of registering as absolute, a title that is open to technical objection, provided the defect is one that will not cause the holding to be disturbed.[87] When the title has been examined and approved, either because it is technically perfect, or because such objections as may have been made

[83] *Ibid.* r. 26, proviso.
[84] *Ibid.* r. 304.
[85] Land Registration Fee Order, 1930, Fee Order Rule 5.
[86] *Ibid.* Fee Order Rule 8.
[87] Land Registration Act, 1925, s. 13, proviso (*c*).

have been disposed of, and the time limited under notices and advertisements has expired, the registration is completed, and takes priority as from the day on which the application was lodged in the Registry.[88] The deed inducing first registration is officially marked,[89] as is every deed creating a rentcharge, and they are re-issued to the applicant with the land or charge certificate and such of the remaining deeds and documents lodged by him as are not required to be retained for filing in the Registry.[90]

Entries on the Register

In so far as the title to the land is concerned, the land certificate relating to an absolute title entirely replaces the title deeds in unregistered conveyancing, because all retrospective examination of title is, for the future, avoided. In so far as incumbrances are concerned, their existence and certain pertinent facts about them are disclosed in the land certificate, although details of their precise nature and effect must be ascertained by reading the deeds which created them, or an abstract of them, unless verbatim extracts from them are set out on the register. When land is burdened by rentcharges, the *ipsissima verba* of the relevant deeds, in their proper context, are of vital importance, so that although it would always be possible to set out lengthy extracts from these deeds on the register (being the equivalent of anything from three to twenty-five pages of an abstract), experience has shown that landowners and their solicitors prefer to refer to the actual deeds creating the rentcharges or, if they are not available, to copies or full abstracts of them. This preference has helped to mould the practice of the Registry in preparing the entries for the Register. The keynote to this practice is that the register should serve as a pointer, indicating the deeds which create or apportion rentcharges, and stating the location of those deeds. The normal aim, as has been mentioned already in connection with the lodgment of documents for registration,[91] is that both the registered proprietor and the Registry should possess the fullest available evidence of the contents of the deeds and, ideally, the proprietor will hold the duplicate conveyance by which a rentcharge was created whilst the Registry files a certified copy of it. The remarks column in the charges register will state what has been done in each case. It may interest the reader to see examples of typical entries in the register in a number of different situations which commonly arise, and these are appended.

[88] Land Registration Rules, 1925, r. 42. [89] Land Registration Act, 1925, s. 16.
[90] Land Registration Rules, 1925, r. 310 (1). [91] See p. 18.

NORMAL ENTRY OF RENTCHARGE

Set out below is an example of the normal method of entering a rentcharge on the charges register as an incumbrance on the land. It will be observed that the number of words in the entry has been reduced to a bare minimum and that when the deed creating the rentcharge contains restrictive covenants in addition to the covenants for the protection of the security, these are the subject of a separate entry. When a rentcharge affects other land besides that being registered, the Registry will not be content with a vague verbal reference to "other land." Sometimes the entire area is identified by a reference by tinting on the filed plan, but more often, and whenever possible, the land will be described by its street name and numbers. Thus, on the charges register of the title to *23 Boulburn Street* there would be the following entries:

	Title P. 000515 C. CHARGES REGISTER	Application No. and remarks
1.	Nos. 21 to 39 (odd numbers) Boulburn Street are subject to a perpetual yearly rentcharge of £13 12s. 7d. created by a Conveyance dated 4 December 1880, and made between (1) William Walsh (2) Daniel Duce and Deborah Duce (3) Zephaniah Zetland.	Abstract issued with certificate: abstract filed.
2.	The Conveyance dated 4 December, 1880 (referred to in entry No. 1 above) contains restrictive covenants.	

RENTCHARGE AND OVERRIDING RENTCHARGE

More often than not the land which is being registered is subject to first and second rentcharges. If part of the land out of which a rentcharge already issues is sold subject to a new and improved rentcharge, and the vendor covenants to pay the overriding rentcharge himself, and gives the purchaser a power to retain the new rentcharge if he is called upon to pay the overriding rentcharge, these facts will normally appear on the face of the register.

	Title P. 000516 C. CHARGES REGISTER	Application No. and remarks
1.	The land tinted blue on the filed plan is subject to a perpetual yearly rentcharge of £25 7s. 8d. created by a Conveyance dated 4 April 1893, and made between (1) Leslie Laybourn (2) Max Myhill. NOTE: The Conveyance dated 6 May, 1950, (referred to in entry No. 3, below) contains a covenant by the vendor by way of indemnity to pay this rentcharge and a power of retainer in favour of the purchaser.	Abstract issued with certificate: abstract filed.

	C. CHARGES REGISTER	Application No. and remarks
2.	The Conveyance dated 4 April, 1893 (referred to in entry No. 1, above) contains restrictive covenants, exceptions and reservations.	
3.	The land is subject to a perpetual yearly rentcharge of £4 10s. created by a Conveyance dated 6 May, 1950, and made between (1) Oliver Otter (2) Valentine Vaux.	Conveyance issued with certificate: copy filed.

Terminable Rentcharge

A terminable rentcharge will be noted as an incumbrance thus:

	Title P. 000517 C. CHARGES REGISTER	Application No. and remarks
1.	Terminable yearly rentcharge of £25 created by a Deed of Grant dated 1 October, 1956, and made between (1) Max Myhill (2) Baxendale (Builders) Limited (3) Frederick Fothergill and charged upon the land in this title for a term of 99 years from 29 September, 1956, (but determinable as therein mentioned).	Rentcharge registered under P. 00083: duplicate Deed of Grant issued with certificate.

Informal Apportionments

Formal (legal) apportionments are rare and present no special difficulty on first registration of the land subject to the rentcharge. Obviously a great deal of detail may be omitted from the register, and, indeed, a bare statement that the rent has been formally apportioned as to £—— in respect of the land in the title should suffice, particularly when it is borne in mind that if the statement is erroneous and any person suffers loss in consequence of it, he will be entitled to be indemnified out of the Land Registry Insurance Fund.[92] Informal (equitable) apportionments, on the other hand, are exceedingly common and persons dealing with the registered proprietor are naturally anxious to know how they stand in regard to past apportionments. Occasionally, informal apportionments are treated, by solicitors, as is evidenced by the language used in subsequent deeds, as if they had freed the land of part or the whole of the liability, but this of course, is not the case, so that the rentcharge must be noted on the register together with a note of the apportionments. When part of the land which is subject to a rentcharge has been conveyed to the applicant for first registration together with the benefit of powers, remedies and covenants contained

92 Under the Land Registration Act, 1925, s. 83 (2), or, if the error is corrected, under *ibid.* s. 83 (1).

in deeds informally apportioning the rentcharge, the mere fact that an entry is made of the apportionments in the charges register is evidence that the registered proprietor has the equitable benefits conferred by the deeds. Furthermore, the use of the word " mutual " and a reference to the provisions of section 77 of the Law of Property Act, 1925, (whether appearing on the face of the register or contained in filed documents) clearly indicates that the registered proprietor derives benefits as well as burdens from the deeds. For that reason alone it is unnecessary to enter these benefits on the property register as part of the description of the land,[93] even if it were proper to do so.

When the relevant provisions as to apportionments are lengthy or complex, the register will contain the barest possible summary of the position and, should the solicitors acting for the registered proprietor or for a purchaser need to make reference to the documents themselves, there will be available to them the deed or abstract issued with the land certificate and referred to on the register. The following are typical entries relating to informal apportionments:

	Title P. 000518 C. CHARGES REGISTER					Application No. and remarks
1.	Nos. 10 to 30 (inclusive) Liverchester Street are subject to a perpetual yearly rentcharge of £21 7s. 10d. created by a Deed of Grant dated 18 March, 1873, and made between (1) Harold Hollebone (2) Thomas Tyrrel.					Duplicate issued with certificate: copy filed.
2.	By the undermentioned Conveyances the rentcharge of £21 7s. 10d. (referred to in entry No. 1, above) was informally apportioned as follows:					
	Date and parties	*Land conveyed*	*Sum apportioned to land conveyed* £	s.	d.	
	1 June, 1955: (1) Beverley Bain (2) Zephaniah Zetland.	27 Liverchester Street	1	0	6	Abstract issued with certificate: abstract filed.
	20 September, 1955: (1) Beverley Bain (2) Matthew Moxhay.	11 Liverchester Street	1	3	6	No verified particulars were supplied on first registration.
	4 January, 1956: (1) Beverley Bain (2) Stephen Spencer.	30 Liverchester Street	1	3	0	Duplicate issued with certificate: copy filed.
	8 March, 1956: (1) Beverley Bain (2) Pauline Potts.	30 Liverchester Street	1	0	6	Abstract issued with certificate: abstract filed.

[93] *Cf.* the Land Registration Rules, 1925, r. 254.

When, however, the relevant facts of the apportionments can be satisfactorily summarised on the register this may be done, particularly when the Registry knows that transfers of parts of the land are likely to be made later on. Under this alternative method the entries in the charges register might, on the facts exemplified above, take the following form:

Title P. 000518

C. CHARGES REGISTER

		Application No. and remarks
1.	Nos. 10 to 30 (inclusive) Liverchester Street are subject to a perpetual yearly rentcharge of £21 7s. 10d. created by a Deed of Grant dated 18 March, 1873, and made between (1) Harold Hollebone (2) Thomas Tyrell.	Duplicate issued with certificate: copy filed.
2.	By the undermentioned Conveyances the rentcharge of £21 7s. 10d. (referred to in entry No. 1 above) was informally apportioned as follows:	

Date and parties	*Land conveyed and sum apportioned to it*	*Covenants and remedies*
1 June, 1955: (1) Beverley Bain (2) Zephaniah Zetland.	27 Liverchester Street: £1 0s. 6d.	Mutual covenants and cross powers of distress and entry for perception.
20 September, 1955: (1) Beverley Bain (2) Matthew Moxhay.	11 Liverchester Street: £1 3s. 6d.	No verified particulars were supplied on first registration.
4 January, 1956: (1) Beverley Bain (2) Stephen Spencer.	30 Liverchester Street: £1 3s. 0d.	Mutual cross charges and the cross covenants and powers referred to in ss. 77 and 190 of the Law of Property Act, 1925.
8 March, 1956: (1) Beverley Bain (2) Pauline Potts.	30 Liverchester Street: £1 0s. 6d.	Mutual covenants for payment.

Exoneration: Vendor Liable for Overriding Rentcharge

If, in a conveyance of property which is subject to a rentcharge, that rentcharge is, as between the parties, expressed to be charged exclusively upon a part of the land, then obviously, one of two things may happen. Either the land which is being conveyed may be informally exonerated [94] or it may remain charged in informal exoneration of the other land subject to the rentcharge.[95] When

[94] *Cf.* the Law of Property Act, 1925, s. 190 (1) (*b*).
[95] *Ibid.* s. 190 (1) (*a*).

the first of these courses has been adopted, so that the vendor has agreed that his retained land should remain liable for the overriding rentcharge, the position immediately after the occasion of the first sale of part of the land subject to the overriding rentcharge will, on first registration, be shown on the register in the manner indicated in Example 1 below.

Example 1. Suppose that a rentcharge of £45 affects *20 to 30 (inclusive) Mancliffe Street* and that the exonerated land, which is the subject of an application for first registration, is *23 to 30 (inclusive) Mancliffe Street.* The entries in the charges register will be as follows:

	Title P. 000123 C. CHARGES REGISTER	Application No. and remarks
1.	Nos. 20 to 30 (inclusive) Mancliffe Street are subject to a perpetual yearly rentcharge of £45 created by a Conveyance dated 3 May, 1930, and made between (1) Cecil Cox (2) Launcelot Leigh. Note: The Conveyance dated 8 December, 1959, (referred to in entry No. 2, below) contains a covenant by the Vendor to pay the said rentcharge of £45 in exoneration of the land in this title and provides that in case of his default the Purchaser shall have rights of retainer, distress and entry for perception.	Duplicate issued with certificate: copy filed.
2.	The land is subject to a perpetual yearly rentcharge of £50 created by a Conveyance thereof dated 8 December, 1959, and made between (1) Launcelot Leigh (Vendor) and (2) Mary Maloney (Purchaser).	Copy filed.

Example 2. The next example states the position when first registration occurs after a number of sales have taken place although the land being registered (for example, *20 Mancliffe Street*) is not the last plot to be sold. In this example, in addition, the overriding rentcharge is charged upon the retained land.

	Title P. 000124 C. CHARGES REGISTER	Application No. and remarks
1.	Nos. 20 to 30 (inclusive) Mancliffe Street are subject to a perpetual yearly rentcharge of £45 created by a Conveyance dated 3 May, 1930, and made between (1) Cecil Cox (2) Launcelot Leigh. *Note 1*: Each of the undermentioned Conveyances by Launcelot Leigh (Vendor) of parts of the land subject to the said rentcharge charged it exclusively upon the land for the time being retained by him in equitable exoneration of the land conveyed:	Duplicate issued with certificate: copy filed.

	C. CHARGES REGISTER	Application No. and remarks
	Date — *Purchaser* — *Land conveyed* 18 December, 1959 — Mary Maloney — 25 Mancliffe Street 1 January, 1960 — Thomas Tyrrel — 22 Mancliffe Street 13 January, 1960 — Arthur Attenborough — 21 Mancliffe Street *Note* 2: The Conveyance dated 3 February, 1960, (referred to in entry No. 2, below) contains a covenant by the Vendor to pay the said rentcharge of £45 and in case of his default confers upon the Purchaser (1) a power to retain the rentcharge created by the said Conveyance, and, (2) a power of distress.	
2.	The land in this title is subject to a perpetual yearly rentcharge of £9 10s. created by a Conveyance dated 5 February, 1960, and made between (1) Launcelot Leigh (Vendor) (2) Bertram Barnes (Purchaser).	Duplicate issued with certificate: copy filed.

When the land being registered comprises the last plot to be sold of those subject to the overriding rentcharge, the position can be stated on the register more succinctly than in Example 2, thus:

Example 3.

	Title P. 000125 C. CHARGES REGISTER	Application No. and remarks
1.	Nos. 20 to 30 (inclusive) Mancliffe Street are subject to a perpetual yearly rentcharge of £45 created by a Conveyance dated 3 May, 1930, and made between (1) Cecil Cox (2) Launcelot Leigh. NOTE: Each of 10 subsequent Conveyances by Launcelot Leigh (Vendor) which together comprise the whole of the land subject to the said rentcharge other than the land in this title contains a covenant by the Vendor by way of indemnity to pay the said rentcharge with powers of retainer and distress in favour of the purchaser.	Duplicate issued with certificate: copy filed.

EXONERATION: PURCHASER'S LAND LIABLE

The other situation to be exemplified is the converse of that shown in Example 1, because it is the purchaser's land which is made solely liable for the rentcharge in equitable exoneration of the land retained by, or previously owned by, his vendor. Thus, a rentcharge of £45 affects *20 to 30 (inclusive) Mancliffe Street.* The land being registered is *Nos. 20, 21 and 22* and it is made to

bear the entire burden. In a typical case, the entries on the charges register of the purchaser's title made on first registration will read as follows:

Example 4.

	Title P. 000126 C. CHARGES REGISTER	Application No. and remarks
1.	Nos. 20 to 30 (inclusive) Mancliffe Street are subject to a perpetual yearly rentcharge of £45 created by a Conveyance dated 3 May, 1930, and made between (1) Cecil Cox (2) Launcelot Leigh.	Duplicate issued with certificate: copy filed.
2.	A Conveyance of 23 to 30 (inclusive) Mancliffe Street dated 8 December, 1959, and made between (1) Launcelot Leigh (Vendor) (2) Mary Maloney (Purchaser) contains a covenant by the Vendor to pay the rentcharge of £45 (referred to in entry No. 1, above). The said Conveyance created a perpetual yearly rentcharge of £30 charged upon 23 to 30 (inclusive) Mancliffe Street and provides that in case of default in payment of the rentcharge of £45 or observance and performance of the covenants and conditions affecting 20, 21 and 22 Mancliffe Street the Purchaser should have the following rights, namely: (a) a right to retain the rentcharge of £30; (b) a right to distrain upon 20, 21 and 22 Mancliffe Street. (c) a right of entry thereupon for perception of the rents and profits.	

THE TENANT UNDER AN AGREEMENT AND SECTION 146 OF THE LAW OF PROPERTY ACT, 1925

By Philip H. Pettit, Barrister-at-Law

Position before 1892

Although equity would commonly relieve a tenant against forfeiture for breach of a covenant to pay rent,[1] it became settled in the early nineteenth century [2] that, as a general rule, such relief would not be granted against forfeiture for breach of any other covenant. A landlord might thus, for instance, be able to forfeit a lease for breach of a covenant to insure, notwithstanding that the tenant had remedied the breach and that no damage had occurred while the property was uninsured. The particular case of the covenant to insure was dealt with by the Law of Property (Amendment) Act, 1859, but the first general statutory provision was contained in section 14 of the Conveyancing Act, 1881.[3] For present purposes it is sufficient to say that this section gave a right to apply to the court for relief against forfeiture for breach of any covenant [4] to a tenant holding under a lease. The questions soon arose whether the benefits of this section extended respectively to a person holding under an agreement for a lease and a person holding under a yearly or other periodic tenancy. Two decisions of the Court of Appeal decided both these questions against the claim of the tenant.[5]

In *Coatsworth* v. *Johnson*,[6] there was a written agreement for a lease for twenty-one years under which the tenant had taken possession, though no rent had been paid. According to common law rules there was a mere tenancy at will, but it was argued that, by virtue of the agreement and the doctrine of *Walsh* v. *Lonsdale*,[7] there was a lease in equity to which section 14 would apply. The

1 This power to grant relief was amended and made statutory by the Landlord and Tenant Act, 1730, later replaced by the Common Law Procedure Act, 1852, which still represents the law.

2 *Hill* v. *Barclay* (1811) 18 Ves. 56. See *Barrow* v. *Isaacs & Son* [1891] 1 Q.B. 417.

3 Now replaced by the Law of Property Act, 1925, s. 146.

4 The covenant to pay rent, which has always been treated separately, and certain other covenants were excepted.

5 It will be convenient to use the terms "landlord" and "tenant" to include the intended landlord and tenant under an agreement for a lease, where the context so admits.

6 (1886) 54 L.T. 520.

7 (1882) 21 Ch.D. 9.

Court of Appeal held, however, that the rule that specific performance would not be granted of an agreement for a lease where there had been a breach of an intended covenant such as would give rise to a forfeiture was unaffected by section 14. There was not, accordingly, a lease even in equity and the tenant was not, therefore, entitled to apply for relief against forfeiture for breach of a repairing covenant. This was perhaps carried a little further, as the Court of Appeal recognised, in *Swain* v. *Ayres*,[8] where the facts were, in essence, the same, save that the tenant had not only entered into possession, but had also commenced to pay rent which had been accepted by the landlord. This was held to make no difference to a claim for specific performance of the agreement, and it again followed that the *Walsh* v. *Lonsdale*[9] principle did not apply so as to enable the tenant to allege the existence of a lease which would ground his application for relief. On the facts of this case, by reason of the entry into possession by the tenant and payment of rent accepted by the landlord, the common law implied a yearly tenancy upon such of the terms of the agreement as were not inconsistent with the idea of a yearly tenancy. This did not help the tenant, however, since it was held that a " tenancy " did not come within the meaning of the word " lease " in section 14.[10]

Agreement for Lease Today

A few years later the Conveyancing Act, 1892, was passed, section 5 of which amended section 14 of the Conveyancing Act, 1881, by providing " ' lease ' shall also include an agreement for a lease where the lessee has become entitled to have his lease granted." This provision has now been repealed and replaced, without change of language, by section 146 (5) (*a*) of the Law of Property Act, 1925. At first sight one might assume that section 5 of the 1892 Act was intended to reverse the principle laid down in *Swain* v. *Ayres*[11] and *Coatsworth* v. *Johnson*,[12] so as to enable the tenant under an agreement for a lease to apply for relief against forfeiture in the same way as a tenant under an actual lease. Whatever the intention may have been, most of the leading textbooks,[13] however, state that this principle still applies so that a

[8] (1888) 21 Q.B.D. 289.

[9] *Supra.*

[10] See also *Charrington & Co.* v. *Camp* [1902] 1 Ch. 386.

[11] *Supra.*

[12] *Supra.*

[13] See, *e.g.*, *Foa on Landlord and Tenant*, 8th ed., p. 671; Halsbury's *Laws of England*, 3rd ed., Vol. 23, pp. 464, 674; Halsbury's *Statutes of England*, 2nd ed., Vol. 20, pp. 739, 747; *Hill and Redman on Landlord and Tenant*, 12th ed., p. 484; Wolstenholme & Cherry's *Conveyancing Statutes*, 12th ed., Vol. 1, pp. 489–490.

breach of covenant on the part of a tenant would prevent him from obtaining a decree of specific performance and thus, in section 146 proceedings, from saying that he "has become entitled to have his lease granted." Accordingly, such a person cannot apply to the court for relief under section 146. On this view the result seems to be that a person who is merely a tenant holding under an agreement will never be able to claim the benefit of the section, *i.e.*, nothing is added to the meaning of a "lease" by the provision in question. It seems doubtful whether this last statement requires any qualification, but two points should, perhaps, be mentioned.

The first is suggested by the remarks of Lord Esher in *Swain* v. *Ayres*,[14] where he said: ". . . . it was argued that a Court of Equity would grant specific performance notwithstanding the breaches of covenant. It may be that under certain circumstances a Court of Equity would do so, but I do not think that it has ever been held that specific performance would be granted in cases where there was a breach of contract to repair without any other circumstances, such as surprise or some other excuse." It would appear, accordingly, that in an exceptional case a decree of specific performance might be available notwithstanding a breach of covenant, so as to bring the agreement within the definition of a lease. Though this may be so, it would seem to be of minimal practical importance, for in such case it seems that the tenant would not need to invoke section 146. The exceptional circumstances which would enable the court to grant a decree of specific performance, would presumably also enable the court to grant relief against forfeiture. For although equity refused to grant relief as a general rule, it never gave up its jurisdiction to grant relief in a special case on grounds of fraud, accident or mistake.[15]

Secondly, it might be suggested, in reliance on the old law, that the tenant under an agreement would be entitled to specific performance if there was a serious dispute as to whether there has been a breach of covenant or not. Before 1875 it will be remembered that the Court of Chancery would have decided whether a decree of specific performance should be granted, while a court of common law would have decided whether there was a breach of covenant such as would entitle the landlord to forfeit the lease. At this time in the Court of Chancery, in relation to a Bill seeking specific performance, the rule established was that if a breach of covenant was clearly made out, specific performance would be refused, while if there was a conflict of evidence as to this, "the proper decree was to direct the lease to be dated at a time antecedent to the

[14] (1888) 21 Q.B. at p. 294. See also *Strong* v. *Stringer* (1889) 61 L.T. 470.
[15] See the discussion in *Barrow* v. *Isaacs & Son* [1891] 1 Q.B. 417.

alleged breach, and to require from the plaintiff an undertaking to agree in any action that the lease was executed on that day." [16] It does not seem that this distinction can have survived the Judicature Acts for there is now, of course, only one court and so far as possible all matters of controversy must be completely and finally settled in one action. It is submitted that the judge can and should now first decide whether a breach of covenant has been made out or not. If it has, the tenant will, on the basis of the principles above stated, not be entitled to have his lease granted; if it has not, there is no basis for a forfeiture action.

In contrast to the textbooks already referred to, Woodfall,[17] apparently preferring the "mischief" rule to the "literal" rule, though without discussion of the issue involved, submits "that the words 'but for the forfeiture sued upon' ought to be understood as following the word 'entitled' [in subsection (5) of section 146] inasmuch as the committal of an act of forfeiture is one of the recognised grounds for the refusal of a decree of specific performance." The main argument [18] in favour of this view seems to be that it gives a reasonable meaning to words that are otherwise virtually meaningless. On the other hand, in what seems to be the only relevant case in the English law reports,[19] which arises on the same words contained in section 93 of the New Zealand Property Law Act, 1908, such a construction was disapproved by the Judicial Committee of the Privy Council. Here it was said "by construing the definition of lease above cited from section 93 . . . as meaning 'where the lessee has become entitled to have his lease granted had there been no forfeiture' they give by intendment of law what the statute does not in terms enact, namely, that a person who, by failure to perform his obligation, is disentitled to have his lease granted is to be treated as though he had not become disentitled."

Yearly Tenancy Today

If the view of the textbook writers referred to in note 13 above is correct and the result is that there is no lease in equity there may still, in accordance with the common law rules, be a yearly [20] tenancy where the tenant under the agreement has entered into

[16] *Rankin* v. *Lay* (1860) 2 De G.F. & J. 65, *per* Lord Campbell L.C., citing *Gregory* v. *Wilson* (1852) 9 Hare 683; *Lewis* v. *Bond* (1853) 18 Beav. 85; *Pain* v. *Coombs* (1857) 1 De G. & J. 34; *Lillie* v. *Legh* (1858) 3 De G. & J. 204

[17] *Landlord and Tenant*, 25th ed., p. 1010.

[18] It seems doubtful whether a tenant who has at some time "become entitled to have his lease granted" can claim to continue to be included within the definition after he has ceased to be so entitled.

[19] *Greville* v. *Parker* [1910] A.C. 335.

[20] Or other periodic tenancy, where the rent has been paid by reference to some period other than a year.

possession and paid rent by reference to a year. Before 1926, as we have seen, this would not have availed the tenant, but since 1925 such a tenancy will presumably be included in the somewhat unhappy definition in section 154 of the Law of Property Act, 1925, wherein it is stated that in that part of the Act [21] " ' lease ' includes an underlease or other tenancy." The new section was presumably intended to get over the rule stated in *Swain* v. *Ayres* [22] that a lease is something different from a tenancy, and presumably is effective for this purpose, although it is at least inelegant that the first reference to a tenancy as distinct from a lease should be to an " other tenancy." There seems little doubt, however, but that this definition would now include a yearly tenancy within the meaning of the word " lease."

It is surprising that there appears to have been no decision on the construction of section 5 of the Conveyancing Act, 1892, though by reason of the effect of section 154 of the Law of Property Act, 1925, less surprising that no case has arisen since 1925 upon the corresponding provision, section 146 (5) (*a*), of the latter Act. The position since 1925 is, where rent has been paid, that there will be a lease for the purposes of section 146 either by virtue of the provisions of subsection 5 (*a*), if the *Walsh* v. *Lonsdale* [23] doctrine applies,[24] or by virtue of the provisions of section 154, if it does not.[25] In either case the tenant will be able to apply to the court for relief. Where rent has not been paid, however, it remains a nice question on the construction of section 146 (5) (*a*) whether a tenant under an agreement [26] can claim the benefit of the section on the ground that he " has become entitled to have his lease granted."

21 This includes s. 146.
22 (1888) 21 Q.B.D. 289. *Cf. Blane* v. *Francis* [1917] 1 K.B. 252.
23 (1882) 21 Ch.D. 9.
24 This is the view taken by Woodfall, *op. cit.*
25 That *Walsh* v. *Lonsdale* does not apply is the view of the textbooks cited in n. 13, *supra*.
26 Such a person would be a tenant at will at law. It could hardly be contended that he comes within s. 154, but even if he did, he could not claim relief under s. 146 as his tenancy would not be forfeited for breach of covenant but simply determined.

THE MODERN LAW OF AGRICULTURAL HOLDINGS—II

More About Notices to Quit

By J. Muir Watt, m.a., Barrister-at-Law

This second article deals with a number of further matters affecting notices to quit agricultural holdings. As often as not it is in regard to notices to quit that the help of the legal practitioner is sought. A great many day-to-day matters relating to agricultural holdings are dealt with by land agents and agricultural valuers without the need for legal advice. Examples are the settlement of compensation for improvements and tenant-right on changes of tenancy and the conduct of rent arbitrations. As regards the latter, the arbitrator is an experienced agricultural valuer of high standing and, although solicitors and even counsel sometimes appear before them, in a great many cases the advocates are land agents and valuers. These members of the "landed profession," as it is sometimes called, have a very good knowledge of the law of agricultural holdings, a much more intimate knowledge indeed than many legal practitioners. It is, however, where general principles of law impinge upon the special code of agricultural holdings legislation that the lawyer's assistance is often required, and this is not uncommon in the case of notices to quit.

Security of tenure: a footnote on the tenant's death and a warning

A recent case which came before the Court of Appeal illustrates the troubles which may arise if the incorrect procedure is adopted by the landlord's advisers following the tenant's death. In this case,[1] the tenant had left a will and appointed executors but the landlord's solicitors assumed that he had died intestate and served a notice to quit on the President of the Probate, Divorce and Admiralty Division within the period of three months from the tenant's death laid down by section 24 (2) (*g*) of the Agricultural Holdings Act, 1948. Unfortunately, they did not take the precaution (which should always be taken where it is not known for certain whether the tenant died testate or intestate) of also serving a notice to quit on the person actually carrying on the farming

[1] *Thorlby* v. *Olivant* (1960) 175 E.G. 211.

of the holding.[2] However, after the solicitors acting for the tenant's executors had drawn attention to the fact that the tenant had died testate the landlord's solicitors sent the executors' solicitors a copy of the notice served on the President. The tenancy was an April 6 tenancy and the notice served on the President had been served on April 3, 1957, with a view to terminating the tenancy on April 6, 1958. The letter to the executors' solicitors was dated April 17, 1957, and, although all it purported to do was to forward a copy of the notice to quit for information, it was sought to argue in subsequent proceedings that the letter and accompanying copy notice were effective to terminate the tenancy on April 6, *1959*. The Court of Appeal, affirming the county court judge, held that the letter must be read as intending only to inform the executors' solicitors of the notice served on the President and could not be construed as constituting, together with the copy notice, an independent notice to quit taking effect on the following April 6. The position, therefore, was that no effective notice to quit had been served within three months of the tenant's death (the notice served on the President being of no effect as the tenancy had never vested in him) and, accordingly, the advantage of section 24 (2) (*g*) had been lost. It must be observed that in this case the landlord's solicitors had still time, after being informed that the tenant had died testate, to take advantage of the three months' period allowed by section 24 (2) (*g*), to serve an effective notice to quit on the executors. Instead of this, all they did was to forward, without explanation, a copy of the notice which had been served on the President. This case stands as a warning to solicitors acting for landlords to consider very carefully the position following the tenant's death and make sure that the proper notices are served in time. The loss of the opportunity given by section 24 (2) (*g*) to obtain vacant possession could be very serious in view of the difficulty of getting rid of any reasonably competent tenant during his lifetime.

Security of tenure: progressive rent device

There may be occasions when an owner wishes, quite reasonably, to let agricultural land for a period of years but wishes to be certain of recovering possession after the end of that period. Some potential tenants may be willing to fall in with such a plan; indeed, it may happen to suit their own purposes. Unless, however, the landlord is willing to rely on a gentlemen's agreement to this effect,

[2] See the first article in this series (1960) 24 Conv.(N.S.) p. 37 and Jackson and Muir Watt, *Agricultural Holdings* (11th ed.), p. 53.

the question arises as to how legal force can be given to the parties' intention. One method, already referred to,[3] would be to interpose a " tame " tenant between the owner and the occupier, thus giving the latter a sub-tenancy. Apart from any other objection, however, this method depends upon the wording of the present statutory instrument,[4] which could be revoked and replaced by something giving sub-tenants better security. Another method would be to provide in the contract of tenancy for a rent which would become steeply progressive at about the time when the landlord is likely to wish to regain possession. The tenant would then be faced with the choice of paying a rent higher than he could afford or himself giving notice to quit. There seems to be no legal or ethical objection to such an arrangement but if the progressive increases are too stiff the tenant may demand a rent arbitration.

Security of tenure: applications for consent to notice to quit

Even if a landlord can find no ground on which he can rely for the purpose of excluding the tenant's security of tenure, under the machinery of section 24 (2) of the 1948 Act, he may yet succeed in obtaining the consent of the Agricultural Land Tribunal to the notice to quit and thus get rid of the tenant. Before January 26, 1959, the landlord's application for consent was made to the Minister of Agriculture (in fact, as a result of delegation, to the appropriate county agricultural executive committee), with a right of appeal to the Agricultural Land Tribunal.[5] On and after that date, however, the application is made direct to the Tribunal.

General procedure

The landlord's application for the Tribunal's consent, if made before the giving of the notice to quit, must be made not less than three and not more than twelve months before the commencement of the period of the notice, and, if made after the service of the tenant's counter-notice, must be made within one month of the service of the latter. The application must be made substantially in accordance with the prescribed statutory form.[6] This is form 1 in the Appendix to the Agricultural Land Tribunals Rules, 1959.[7]

[3] See previous article in (1960) 24 Conv.(N.S.) p. 29.
[4] The Agricultural Land Tribunals and Notices to Quit Order, 1959 (S.I. 1959, No. 81), art. 10.
[5] More correctly, a hearing *de novo* by the Tribunal: see *Davies* v. *Price* [1958] 1 W.L.R. 434, at 441.
[6] See rule 2 of the Agricultural Land Tribunals Rules, 1959, in the Schedule to the Agricultural Land Tribunals and Notices to Quit Order, 1959 (S.I. 1959, No. 81).
[7] See last note for full reference.

A statutory form is also provided for the tenant's reply (form 1R in the Appendix). Although a failure to comply with the statutory form is not necessarily fatal,[8] it is desirable to comply with it. The Rules lay down various requirements about the number of copies of the application required, supporting documents, maps, and so on. They also set out the general procedure for applications to Tribunals and should be carefully studied before any procedural steps are taken. It may be noted that where the Tribunal give consent they have power to postpone the termination of the tenancy by the notice for any period not exceeding twelve months if the notice would otherwise come into operation on or within six months after the giving of the consent. This power is exercisable either on the Tribunal's own motion or on the tenant's application (made within fourteen days after the giving of the consent).[9]

Changes made by the Agriculture Act, 1958

Apart from substituting a direct application to the Tribunal for the previous machinery of applications to the Minister with the Tribunal as a subsequent step, the 1958 Act introduced some detailed modifications in regard to the grounds of consent and what has been called a "change of emphasis" in regard to the principles on which the Tribunal has to act. Under the 1948 Act, as originally enacted, the Minister was given an overriding discretion to withhold consent even if the landlord established one of the five grounds set out in section 25 (1).[10] Section 25 (1), as amended by the 1958 Act, also sets out five grounds (only two of which are exactly the same as before) but it provides that the Tribunal *shall* consent if they are satisfied as to one or more of these five matters, being a matter or matters specified in the landlord's application for consent. If the 1958 Act amendment had stopped here it would have meant a substantial concession to landlords. It did not, however, because there is a very important proviso that notwithstanding that they are so satisfied they *shall withhold* consent "if in all the circumstances it appears to them that a fair and reasonable landlord would not insist on possession." When the effect of this proviso is digested the reader may not feel entirely sure how far, if at all, the 1958 Act shifted the emphasis in the landlord's favour. The former unqualified discretion of the Minister to refuse consent, even if the landlord had made out a case on one of the grounds, has been replaced by an obligation on the Tribunal to refuse consent if they

[8] See rule 34 of the Rules cited in note 6 above.
[9] See art. 9 of the Order mentioned in note 6 above.
[10] He had no discretion to *give* consent if none of the five grounds existed.

consider that the landlord is not acting fairly and reasonably in insisting on possession, even if he has established one of the modified five grounds. This means that, at least in theory, the power to refuse consent has been somewhat restricted. A duty to refuse consent in defined circumstances is less wide than an unqualified discretion to refuse. To that extent the shift of emphasis is somewhat in the landlord's favour. The difficulty is, however, that the "fair and reasonable landlord" formula is not very precise. Although it appeals to an objective conception, that of a "fair and reasonable landlord," like the "reasonable man" of the common law, there is likely to be a subjective element in its application by Tribunals.

A "fair and reasonable landlord"

It will thus be a little difficult to predict how a particular Tribunal will interpret the proviso. One point, however, seems to be fairly clear. If a landlord is *either* not fair or not reasonable, he is not "fair and reasonable." Obviously the words "fair" and "reasonable" must mean different things in this context. The contrast between them seems to be almost equivalent to the old contrast between the attitudes of equity and common law. Although the landlord might be able to show a perfectly reasonable case for insisting on possession it might, in the circumstances, be "unconscientious" for him to do so. In such a case his action would be that of a "reasonable" but not of a "fair" landlord and it would be the duty of the Tribunal to refuse consent. One possible application of the proviso is rather puzzling. The structure of section 25, as amended, implies that the Tribunal may be satisfied on any of the five grounds and yet justified in taking the view that in all the circumstances a fair and reasonable landlord would not insist on possession. This means that a landlord who has established "greater hardship" under section 25 (1) (*d*) might yet be defeated on the ground that a fair and reasonable landlord would not so insist. Yet in a case where the balance of hardship is in the landlord's favour it would appear that to refrain from insisting on possession would qualify for the description of "magnanimous" rather than merely "fair and reasonable." A further point should be noted. The Tribunal may take into account any relevant consideration in applying the "fair and reasonable landlord" proviso, including hardship to the tenant, although the landlord has not himself invoked the hardship paragraph (para. (*d*) of s. 25 (1)).

Grounds for consent

The correct procedure seems to be for the Tribunal to decide first whether the landlord (on whom the onus rests) has established one or more of the grounds for consent specified in paragraphs (a) to (*e*) of section 25 (1) of the 1948 Act, as amended. If they decide this point in the landlord's favour the Tribunal must then consider whether the "fair and reasonable landlord" proviso applies. A Tribunal which failed to keep these two issues distinct might be in danger of having their decision quashed on certiorari.[11]

It is not proposed to deal with the individual grounds for consent in complete detail but only to draw attention to the most important points in relation to them, particularly where the 1958 Act has introduced a change.

(a) GOOD HUSBANDRY

To satisfy this paragraph the landlord has to establish that the carrying out of the purpose for which he proposes to terminate the tenancy is desirable in the interests of good husbandry as respects the land to which the notice relates, treated as a separate unit. In contrast with the position under the next paragraph, the landlord is not permitted to show that the land would be better dealt with if amalgamated with other land. For the present purpose the land has to be treated "as a separate unit." Both this and the next paragraph envisage a comparison between the present régime under the existing tenant, and the proposed régime if the tenancy is terminated, but in the case of this paragraph it is without regard to any land except that to which the notice to quit relates. Thus it is not sufficient merely to show that the tenant is an unsatisfactory farmer. A comparison is necessary. The landlord can satisfy the paragraph if he shows that either he himself or someone to whom he proposes to let the land will, if consent is given, take it and farm it better than the present tenant.[12]

(b) SOUND MANAGEMENT

To satisfy this paragraph the landlord has to establish that the carrying out of the purpose for which he proposes to terminate the tenancy is desirable in the interests of sound management of the estate of which the land to which the notice relates forms part or which that land constitutes. As in the case of the last paragraph,

[11] *Cf. R.* v. *A.L.T. for the Eastern Province, ex p. Grant* [1956] 1 W.L.R. 1240 (under old procedure but still relevant).

[12] *Cf. Davies* v. *Price* [1958] 1 W.L.R. 434 (decided on original para. but in principle still applicable).

a comparison is involved, between the present régime under the existing tenant and the proposed régime if the tenancy is terminated, but in this case the Tribunal is permitted to look beyond the land to which the notice to quit relates and consider, for example, whether the amalgamation of that land with other land belonging to the landlord would produce a more economic unit of production.[13] The notion of comparison presupposes that the landlord has something concrete with which to compare the present régime, a definite scheme, in other words, not a mere vague suggestion that things would be better. In most cases the scheme will probably relate to the amalgamation of holdings. The last words of the paragraph, however, " or which that land constitutes," make it clear that this paragraph can be invoked where the landlord can show, for estate management as distinct from husbandry reasons, that the proposed régime is preferable to the existing one for the holding considered by itself. The expression " sound management " is not to be equated with " good estate management," a conception which still has some statutory force despite the dismantling of the state-administered apparatus of disciplinary powers which were contained in Part II of the Agriculture Act, 1947. " Sound management " does not attract the extended definition of " good estate management " in section 10 (which with s. 11 alone remains standing in Part II) of the 1947 Act. " Sound " seems to connote well-judged, sensible, forward-looking and well-informed action.

(c) AGRICULTURAL RESEARCH, ETC., SMALLHOLDINGS OR ALLOTMENTS

To satisfy this paragraph the landlord has to establish that the carrying out of the purpose for which he proposes to terminate the tenancy is desirable for the purposes of agricultural research, education, experiment or demonstration (it should be noted that the word " agricultural " qualifies all these four purposes) or for the purposes of the Acts relating to smallholdings or allotments. There is not much that can be said about research except that it is not confined to research carried out by the state or public bodies. The second part of the paragraph would cover a case where it is desirable to terminate a tenancy, not for inefficiency, but because, say, the smallholder has taken on so much additional land that he can no longer be regarded as a smallholder.

[13] Contrast the position under the original s. 25 (1): *R.* v. *A.L.T. for the Wales and Monmouth Area, ex p. Davies* [1953] 1 W.L.R. 722 and *R.* v. *A.L.T. for the Eastern Province, ex p. Grant* [1956] 1 W.L.R. 1240.

(d) GREATER HARDSHIP

This paragraph, which replaces in a much simpler form paragraphs (*c*) and (*d*) of the original section 25 (1), at once suggests the analogy of the Rent Restrictions Acts. To satisfy it the landlord has to establish simply that greater hardship would be caused by withholding than by giving consent to the notice. It is a straightforward comparison of respective hardships, the onus of proof being on the landlord to establish that his hardship would be the greater. It will be remembered that, by contrast, the onus under the Rent Restrictions Acts is on the tenant to show that greater hardship would be caused by granting the landlord possession than by refusing it. It is a moot point how far Rent Acts decisions on the hardship issue can be applied to the present paragraph. Some of them probably can but others seem to be inapplicable for the reason that what is being sought is possession of an agricultural holding, not primarily a family home. Thus the range of persons whose hardship can be taken into account for the purposes of the Rent Acts—"relatives, dependants, lodgers, guests, and the stranger within the gates"[14]—is probably considerably wider than that which is applicable to an agricultural holding. Hardship in this context seems to mean primarily hardship to the landlord or tenant personally, but hardship to a member of the landlord's or tenant's family, *e.g.*, a son, may be relevant in some cases.[15] Neither the mere interruption of a family tradition[16] nor the probability that the tenant will exercise his common law right of assignment (not excluded by the contract of tenancy), and thus destroy the landlord's hopes of one day taking advantage of section 24 (2) (*g*),[17] seem to constitute hardship for the present purpose. It seems fairly clear that even if the landlord does not put hardship in issue by invoking paragraph (*d*) of the amended section 25 (1) the Tribunal may take into account hardship to the tenant in considering the application of the "fair and reasonable landlord" proviso.

(e) NON-AGRICULTURAL USE

To satisfy this paragraph the landlord must establish that he proposes to terminate the tenancy for the purpose of a non-agricultural use not falling within section 24 (2) (*b*). If the present paragraph is read with section 24 (2) (*b*), it appears to cover the

[14] *Harte* v. *Frampton* [1948] 1 K.B. 73, at 79 (Asquith L.J.).
[15] *Addington* v. *Sims* (1952) 159 E.G. 663 (A.L.T. decision).
[16] *Crawford and McNicol* v. *Hamilton McKinlay* [1954–5] A.L.R. 156 (Scottish Land Court).
[17] *Kingham* v. *Burnell* (1955) 167 E.G. 555 (A.L.T. decision).

case where planning permission is not required *by virtue of* a provision in the town and country planning legislation. An example is private forestry: section 12 (2), proviso (e), of the Town and Country Planning Act, 1947.

Imposition of conditions when giving consent

The Tribunal, when giving consent to a notice to quit, may impose such conditions as appear to them requisite for securing that the land to which the notice relates will be used for the purpose for which the landlord proposes to terminate the tenancy. The Tribunal may vary or revoke any such condition, on the landlord's application, where they are satisfied that a change of circumstances justifies this course.[18] Two points of interest arise in connection with such conditions, namely, the kind of conditions which may be imposed and the sanction for non-compliance.

A condition must be of a kind designed to secure that the land to which the notice relates will in fact be used for the purpose which the landlord proposes to terminate the tenancy. Its object, therefore, must be to control the purpose for which the land which was the subject of the notice will be used. A condition which has quite a different object will be invalid and could be quashed. Thus it would be quite legitimate to impose a condition that the landlord shall let the holding to a tenant approved by the Tribunal, but the Tribunal would have no jurisdiction to impose a condition that the landlord shall grant a lease of other land to the outgoing tenant.[19] A condition imposed by the Scottish Land Court under the corresponding Scottish provision in a reported case appears to be invalid on this principle—a condition that the tenant's mother and sister were to be allowed to reside rent-free in the farmhouse during their lifetime.[20]

Since the Agriculture Act, 1958, the only sanction for disobedience to a condition is an order by the Tribunal for the payment by the landlord of a penalty not exceeding two years' rent of the holding.[21] The penalty is a Crown debt and is paid into the Exchequer. The application for the penalty is made by the Treasury Solicitor to the Tribunal on a statutory form.[22] It should be particularly noted (a) that there is no power to apply the penalty or any

[18] s. 25 (5) (6).
[19] *Cf. R.* v. *Agricultural Land Tribunal* (*S. E. Area*), *ex p. Boucher* (1952) 159 E.G. 192 (decision quashed on certiorari).
[20] *Shaw-Mackenzie* v. *Forbes*, 1957 S.L.C.R. 34.
[21] s. 29 of the 1948 Act (as substituted by the 1958 Act).
[22] See Form 4 in the Appendix to the Agricultural Land Tribunals Rules, 1959, scheduled to the Agricultural Land Tribunals and Notices to Quit Order, 1959 (S.I. 1959, No. 81).

part of it towards compensating the former tenant even if the landlord's disobedience to the condition is such as to show that he got possession on a pretext, and (b) that the tenant cannot rely on the landlord's breach of condition as a justification for refusing to give up possession.[23]

Methods of challenging Agricultural Land Tribunal's decision

It is not proposed to enlarge on the details of the procedure here, but it should be noted, for completeness, that there are two methods by which the Agricultural Land Tribunal's decision in a security of tenure case can be challenged. The first method, which was until September 1, 1954,[24] the only method, is by means of the machinery of the prerogative orders of certiorari, prohibition and mandamus. This is, of course, a method of limited application, being confined to preventing or quashing a wrongful usurpation of jurisdiction, compelling the exercise of a jurisdiction erroneously refused and correcting errors of law manifest on the record. The second method, introduced by section 6 of the Agriculture (Miscellaneous Provisions) Act, 1954, is to request the Tribunal to state a case on a question of law for the decision of a Divisional Court of the Queen's Bench Division, or, if such a request is refused, to apply to the court for an order directing the Tribunal to do so. This procedure is, in effect, an appeal on a point of law, although it should be noted that the Tribunal may, on the request of a party, refer a point to the High Court *before* giving their decision.

Position of sub-tenants

Sub-tenants of agricultural holdings are in a weak position as regards security of tenure and it has, indeed, been pointed out earlier that it is possible to exploit this weakness as a method of frustrating the security of tenure provisions of the agricultural holdings code,[25] by ensuring that the occupier of the holding is a sub-tenant and that the intermediate tenant is amenable to the landlord's wishes. The weakness of the sub-tenant's position is partly the inevitable result of common law rules, partly the result of an odd failure of the relevant subordinate legislation to exercise fully the powers conferred by the parent statutory provisions. Section 26 (1) (*d*) of the Agricultural Holdings Act, 1948,[26] provides that:

[23] *Cf. Martin-Smith* v. *Smale* [1954] 1 W.L.R. 247 (applicable still in principle although decided under the old s. 29).

[24] When the case stated procedure was introduced: s. 6 of the Agriculture (Miscellaneous Provisions) Act, 1954, and art. 3 of S.I. 1954 No. 1137.

[25] See previous article, (1960) 24 Conv.(N.S.) pp. 28–29.

[26] As substituted for the old section by the Agriculture Act, 1958, s. 8 and para. 10 of the First Schedule.

"The Lord Chancellor may by order provide—

. . . . . .

(d) for excluding the application of subsection (1) of the said section 24 in relation to sub-tenancies in such cases as may be specified in the order, and for making such provision as appears to the Lord Chancellor expedient for the purpose of safeguarding the interests of sub-tenants, including provision enabling the Agricultural Land Tribunal, where the interest of a tenant is terminated by notice to quit, to secure that a sub-tenant will hold from the landlord on the like terms as he held from the tenant."

The first power given by this paragraph (the exclusion of the application of s. 24 (1)) has been exercised, but not the second. A number of people thought that when the Agriculture (Control of Notices to Quit) Regulations, 1948,[27] were replaced by the Agricultural Land Tribunals and Notices to Quit Order, 1959,[28] the opportunity would be taken to exercise the statutory power given in the second limb of section 26 (1) (*d*) to strengthen the position of sub-tenants. This was not done and one can only speculate that it was because the authorities were satisfied that the weakness which undoubtedly existed in the legal position of sub-tenants had not in practice been seriously exploited. If there had been much evidence of abuse it is fairly certain that the wide power given in section 26 (1) (*d*) would have been deployed.

It may be helpful to summarise the combined effect of the common law rules and the statutory provisions.

Sub-tenants: notices to quit

So far as the termination of the sub-tenant's interest as a result of a notice to quit is concerned, three cases can be distinguished:

(a) NOTICE TO QUIT GIVEN BY TENANT TO SUB-TENANT, THE HEAD LANDLORD NOT BEING INVOLVED

The position here is perfectly simple. The tenant and sub-tenant are in exactly the same position as any other landlord and tenant. The sub-tenant may invoke section 24 (1), unless precluded by section 24 (2), and the tenant will have to apply for consent to the Agricultural Land Tribunal if he wishes to prevent the notice from being ineffective.

[27] S.I. 1948, No. 190.
[28] S.I. 1959, No. 81.

(b) NOTICE TO QUIT GIVEN BY HEAD LANDLORD TO LANDLORD

The overriding principle here is that if the head landlord's notice to quit is effective to terminate the tenancy the sub-tenancy will be destroyed with the tenancy. This proposition is true without qualification. It therefore holds good whatever the reason was for the head landlord's notice to quit taking effect, whether (i) because the tenant was precluded by section 24 (2) from challenging it, or (ii) because he did not trouble to challenge it, or (iii) because he did challenge it but failed to convince the Tribunal. If, for whatever reason, the head landlord's notice to quit takes effect the sub-tenancy will perish, whether the tenant has given the sub-tenant a notice to quit or not, and, if he has, whether or not the sub-tenant has successfully invoked section 24 (1) against the tenant. Thus, as the case of *Sherwood* v. *Moody* [29] demonstrated, although a sub-tenant's right to invoke section 24 (1) is not excluded unless the tenant has both been given notice to quit himself by the head landlord and has stated this fact in giving notice to the sub-tenant,[30] this right cannot be exercised so as to defeat the common law rule that where the head landlord effectively determines the head tenancy by notice to quit, any sub-tenancy carved thereout is likewise determined. In these circumstances the tenant's victory in section 24 (1) proceedings is illusory.

The position where the head landlord's notice is effective is, therefore, simple. If, on the other hand, the head landlord's notice to quit is *not* effective to terminate the head tenancy the position will differ according to the facts, as follows:

(i) If the sub-tenant has not been given a notice to quit by the tenant, the sub-tenant is, of course, unaffected.

(ii) If the sub-tenant has been given a notice to quit by the tenant which stated that the tenant had himself been given notice to quit by his own landlord, then, although the sub-tenant's right to serve a counter-notice under section 24 (1) on the tenant is excluded,[30] his sub-tenancy is preserved by a special provision that the notice to the sub-tenant is to fail with the notice to the tenant.

(iii) If the sub-tenant was given a notice by the tenant which did *not* contain a statement that the latter had been given a notice to quit by his own landlord, the ordinary rules as between landlord and tenant will apply. The sub-tenant's position will depend on whether he served a counter-notice, and, if so, whether the tenant applied for and obtained the consent of the Tribunal. In this case,

[29] [1952] 1 T.L.R. 450.

[30] See art. 10 of the Agricultural Land Tribunals and Notices to Quit Order, 1959 (S.I. 1959, No. 81).

in contrast with the case of *Sherwood* v. *Moody* [31] (where the head landlord's notice to quit was effective to determine the head tenancy) the sub-tenant's victory before the Tribunal in section 24 (1) proceedings will be real and not illusory.

(c) NOTICE TO TERMINATE TENANCY GIVEN BY TENANT TO HEAD LANDLORD

The position where the tenant determines his own head tenancy by giving a notice to quit to his own landlord needs to be carefully noted. It was held in *Brown* v. *Wilson*,[32] applying the principle of *Mellor* v. *Watkins*,[33] that a tenant cannot by his own voluntary act in putting an end to his own tenancy destroy or impair the interest which he has granted to his sub-tenant, and that this proposition applies to a notice to quit given by the tenant to the head landlord as well as to a surrender of his interest by the tenant to the head landlord. The limitations of this doctrine should, however, be appreciated. The principle is only that the notice to quit given by the tenant to the head landlord will not *itself* destroy the sub-tenancy. The tenant, in other words, cannot destroy the sub-tenant's interest by the voluntary destruction of his own interest. The sub-tenancy may, however, be determined by a proper notice to quit given by the tenant to the sub-tenant, *i.e.*, not as a by-product of the destruction of the tenant's interest but by the independent act of putting an end to the sub-tenant's interest by lawful means. The sub-tenant will, of course, be entitled to invoke the machinery of section 24 (1) against the tenant in these circumstances. In *Brown* v. *Wilson* [32] the facts were that the tenant served a notice to quit both on his landlord and on his sub-tenant. The sub-tenant served on the tenant a counter-notice under section 24 (1), but the tenant took no steps to obtain the necessary consent. The notice to quit served by the tenant on the sub-tenant thus became, as a result of section 24 (1), a nullity. The position was, therefore, the same as if no notice to quit had ever been served by the tenant on the sub-tenant. That being so, the question was whether the sub-tenant's interest had been destroyed by the mere effect of the notice to quit given by the tenant to the head landlord. The answer given by Hilbery J. (it is submitted, with respect, correctly) was, no, on the principle of *Mellor* v.

[31] See note 29.
[32] By Hilbery J. at Stafford Assizes. See (1949) 208 L.T. 144 and (1949) 93 S.J. 640.
[33] (1874) L.R. 9 Q.B. 400.

Watkins.[34] If, however, the notice to quit served on the sub-tenant by the tenant had been effective, either because the sub-tenant had served no counter-notice under section 24 (1) or because the tenant had applied for and obtained consent, the sub-tenancy would have been determined. This result would have been brought about, not by the notice given by the tenant to his head landlord but solely by the notice given by the tenant to the sub-tenant.

Sub-tenants: Surrender or forfeiture of tenant's interest

A brief note on the effect on the sub-tenancy of the surrender or forfeiture of the tenant's interest may be useful for completeness. As mentioned above, a tenant cannot by surrendering his interest to his landlord destroy the interest of a sub-tenant.[35] This was established by the common law, and section 139 of the Law of Property Act, 1925, provides in effect that the former sub-tenant will after the surrender hold directly from the former head landlord. He will be able to enforce against the latter all the terms of the former sub-tenancy and claim the protection of the 1948 Act, including the security of tenure provisions of section 24 (1). If the tenant's interest is forfeited the general law in regard to forfeiture will apply. The effect will be that the sub-tenant's interest will be destroyed unless the court in its discretion grants him relief under section 146 (4) of the Law of Property Act, 1925. The court may, on the sub-tenant's application, made either in proceedings by the head landlord to enforce forfeiture or in an action brought by the sub-tenant himself, make an order vesting the land in the sub-tenant for the term of the latter's sub-tenancy or any less term.

Effect on a notice to quit of a subsequent contract of sale

A rather strange survival in the modern law of agricultural holdings is section 30 of the Agricultural Holdings Act, 1948, which invalidates, subject to certain exceptions, a notice to quit given by the landlord to the tenant if during the currency of the notice a contract is made for the sale of the landlord's interest in the land affected by the notice or any part of such land. The persistence of this provision, which dates from the Agricultural Land Sales (Restriction of Notices to Quit) Act, 1919, is strange in view of the general security of tenure provisions of the 1948 Act. Moreover, there is a certain obscurity in regard to the object of the provision now enshrined in section 30 as well as a certain amount of

[34] Hilbery J.'s decision is doubted in Foa's *General Law of Landlord and Tenant*, 8th ed., p. 832, n. (*g*), but appears to be amply justified by the reasoning of one of the greatest of all common law authorities, Blackburn J., in *Mellor* v. *Watkins*: see last note.

[35] The actual point decided in *Mellor* v. *Watkins*. See note 33.

doubt about its interpretation in some respects. It might well be jettisoned when the opportunity is taken to tidy up the present agricultural holdings legislation. The provision at the moment is more of a nuisance than anything else, particularly when executors want to sell after a tenant's death. Although its object has been said to be to prevent an owner from giving notice to quit in order to sell with vacant possession, eminent judges have professed themselves unable to appreciate its true purpose or the mischief it was intended to remedy.[36] If the provision applies, as on one interpretation it may, to a contract to sell to the tenant himself, its purpose is indeed opaque.[37]

The rule

The rule, which applies unless one of the exceptions mentioned below operates, is that when notice has been given by the landlord to the tenant (not vice versa) to quit an agricultural holding, or land comprised in it, the notice to quit is rendered void if during its currency a contract is made for the sale of the landlord's interest in the land affected by the notice or any part of it. The following points of interest may be noted:

(1) Where the "landlord's interest" is severed among various reversioners it seems that a contract by some, but not all, of them for the sale of their fractional interests would not bring the rule into play.[38] This, however, is bound up, as are a number of other points, with the solution of the very abstruse problem of the effect of the severance of the reversion upon the landlord-tenant relationship. It is hoped to come back to this problem in a later article.

(2) It is not clear whether the present wording differs sufficiently from the corresponding wording in previous Acts to enable it to be said with confidence that the rule does not apply to a contract of sale to the tenant himself.[39] The wording of the section seems rather inapt to cover such a sale but the earlier decisions on corresponding but differently worded provisions have to be considered.

(3) If a contract of sale is made before the notice to quit is given and after the notice the purchaser, who has then only

[36] See *per* Bankes and Scrutton L.JJ. in *Blay* v. *Dadswell* [1922] 1 K.B. 632, at 637 and 638, and also Astbury J. in *Rochester and Chatham Joint Sewerage Board* v. *Clinch* [1925] 1 Ch. 753, 756.

[37] See cases cited in last note, and particularly Atkin L.J. in *Blay* v. *Dadswell* at p. 639 and Pitman (of Counsel) *arguendo*, at p. 633.

[38] *Cf.* the *Rochester* case mentioned in note 36 and *Edwards* v. *Hall* [1949] 1 All E.R. 352 (on Def. Reg. 62 (4A)).

[39] See note 37.

an equitable title, contracts for the sub-sale of his interest, the latter does not appear to be a contract for the sale of "the landlord's interest," and so does not appear to attract the section. The matter is not, however, perhaps wholly free from doubt.[40]

(4) The 1948 Act does not stipulate, as the 1923 Act did, that the contract of sale must be made by the identical person by whom the notice to quit was given. Thus if a landlord dies after giving a notice to quit, and his interest thereupon becomes vested in his personal representatives, a contract of sale by them appears to be subject to the rule.

(5) The rule may be an embarrassment to a landlord who wishes to take advantage of section 24 (2) (*g*) by serving a notice to quit on the tenant's personal representatives within three months of his death—one of the few opportunities open to a landlord to obtain vacant possession of an agricultural holding. The notice to quit cannot be delayed, since the advantages of section 24 (2) (*g*) (exclusion of security of tenure and compensation for disturbance) will be lost unless the notice is served within three months of the tenant's death. It may not, therefore, be possible to arrange for the contract of sale to be made before the notice to quit has to be served.

(6) It is not quite clear whether the contract of sale needs to be one which is enforceable by action under section 40 of the Law of Property Act, 1925, but the tendency of judicial dicta has been in favour of the view that it must be.[41]

(7) It is at least doubtful whether a notice to treat under a compulsory purchase order, even if coupled with the ascertainment of the compensation payable (and thus giving rise to a relationship analogous to contract), constitutes a contract of sale for the present purpose.

Exceptions to the rule

The following are the exceptions to the rule, *i.e.*, the cases where a notice to quit is not invalidated by a subsequent contract of sale:

(1) Where within three months before the making of the contract of sale the landlord and the tenant have agreed in

[40] Contrast *Robinson* v. *Nesbitt* [1920] W.N. 57, on the different wording of the 1919 Act. This decision led to the insertion by the Agriculture Act, 1920, of the words "if the contract of sale is made by the person by whom the notice to quit was given." But these added words, although in the 1923 Act, are not in the 1948 Act.

[41] See *per* McCardie J. in *Brooks* v. *Bloor* (1920) 90 L.J.K.B. 577, and Scott L.J. in *Iles* v. *Jones* (1947) 150 E.G. 402.

writing that the notice to quit shall continue in force. The agreement need be in no special form. It is not essential that it should be framed in the words of the section, or refer to it, and, indeed, the tenant need not be aware of his rights in default of agreement.[42] As a result of section 30 (4) the agreement may, without invalidating the notice to quit, provide that the notice is to be conditional on the contract of sale being made.

(2) Where the tenant has given a notice in writing to the landlord, in reply to the latter's notice under section 30 (2) (*a*) of the making of the contract, that he elects that the notice to quit shall continue in force. In order to bring this exception into operation, the landlord must within one month of the making of the contract or the period which remains before the expiration of the notice to quit, whichever is the shorter, give a written notice to the tenant of the making of the contract, and the tenant must give his written notice of election within one month of receiving the landlord's notice and in any case before the notice to quit expires.[43] The formal written notice by the landlord of the making of the contract is essential. Evidence, however unimpeachable, of the tenant's actual knowledge from other sources will not suffice. This machinery for giving formal notice to the tenant certainly suggests that the section is not intended to apply to a contract of sale to the tenant.[44]

(3) Where the landlord has failed duly to give the tenant notice of the making of the contract and the tenant in fact quits the holding in consequence of the notice. This exception was designed to remedy a defect in the 1923 Act which contained no protection for the tenant who actually quitted in pursuance of a notice which had been avoided by a subsequent contract of sale.[45]

Severance of the reversion: difficult problems

Some very difficult problems are arising in connection with the severance of the reversion of an agricultural holding. These problems fall partly under the heading of notices to quit and they will be dealt with in the next article of this series.

[42] See *Rigby* v. *Waugh's Executors* (1931) 100 L.J.K.B. 259.
[43] s. 30 (2) (*a*), (*b*), and reg. 2 (1) of the Agriculture (Miscellaneous Time-Limits) Regulations, 1959 (S.I. 1959, No. 171).
[44] Contrast the wording of s. 26 of the 1923 Act.
[45] s. 30 (3). See *Fox* v. *Neal* (1924) 13 L.J. C.C.R. 11 (C.C.) and *cf. Westlake* v. *Page* [1926] 1 K.B. 298; *Farrow* v. *Orttewell* [1933] Ch. 480; *Streat* v. *Cottey* [1947] E.G.D. 136; *Kestell* v. *Langmaid* [1950] 1 K.B. 233.

NOTES OF RECENT CASES

1. *REAL PROPERTY AND CONVEYANCING*

By F. R. Crane, ll.b., Solicitor

Aberfoyle Plantations, Ltd. v. *Cheng*
[1959] 3 W.L.R. 1011; [1959] 3 All E.R. 910 (J.C.P.C.)

Sale of land—completion of contract—construction—condition precedent—principles as to time.—An agreement of November 8, 1955, provided: "subject to the condition contained in clause 4 the vendor [appellant] will sell and the purchaser [respondent] will buy" the Harewood Estate consisting of rubber plantations (cl. 1); two deposits were to be paid, one on signing the agreement and the other on or before February 1, 1956, and the balance of the purchase-money on or before April 30, 1956 (cl. 2); the purchaser was to have possession on completion and there were provisions for taking over equipment and dividing harvested rubber as at midnight on the day before completion (cll. 2, 7, 8, 11). Clause 4 provided: "The purchase is conditional upon the vendor obtaining at the vendor's expense a renewal of the seven (7) leases described in the schedule hereto so as to be in a position to transfer the same to the purchaser and if for any cause whatsoever the vendor is unable to fulfil this condition this agreement shall become null and void" and the deposits be returned. By clause 9, completion was to take place on April 30, 1956, and on the purchaser paying the balance of the price "the vendor shall as soon as possible thereafter execute a proper transfer of the property to the purchaser. . . ." The leases mentioned, which related to part of the property (182 out of 1,136 acres), had expired in 1950 and their renewal had been for the previous five years under negotiation with the Ruler of Perak—the delay being caused by uncertainty about government policy. On April 30, 1956, the vendor had obtained only a letter agreeing to renewal in principle but it was conceded that this was not compliance with clause 2 above. The purchaser through his solicitors extended the vendor's time to May 31, 1956, and on June 11, 1956, began the present proceedings for return of his deposit. The vendor contended that he was entitled to a reasonable time after April 30, 1956, to fulfil the requirements of the agreement, on the principles laid down in such cases as *Stickney* v. *Keeble* [1915] A.C. 386 and *Smith* v. *Hamilton* [1951] Ch. 174.

The Judicial Committee of the Privy Council (Lord Denning, Lord Jenkins and Mr. L. M. D. de Silva) held, as a matter of construction, that the agreement "made plain beyond argument that the condition [in cl. 4] was a condition precedent on the fulfilment of which the formation of a binding contract of sale between the parties was made to defend" (*per* Lord Jenkins, delivering the judgment of their Lordships at [1959] 3 W.L.R. 1019; [1959] 3 All E.R. 916).

Lord Jenkins further said "subject to this overriding consideration [of construction], their Lordships would adopt, as warranted by authority and manifestly reasonable in themselves, the following general principles: (i) where a conditional contract of sale fixes a date for the completion of the sale, then the condition must be fulfilled by that date; (ii) where a conditional contract of sale fixes no date for the completion of the sale, then the condition must be fulfilled within a reasonable time; (iii) where a conditional contract of sale fixes (whether specifically or by reference to the date fixed for completion) the date by which the condition is to be fulfilled, then the date so fixed must be strictly adhered to, and the time allowed is not to be extended by reference to equitable principles" ([1959] 3 W.L.R. at p. 1016; [1959] 3 All E.R. at p. 914). . . . "Similar considerations are in their Lordships' judgment applicable where a conditional contract of sale fixes no specific date for completion of the sale by the performance of both sides of the bargain, but does fix a date for performance . . . by payment of the purchase-money . . . even though no definite date is fixed for . . . transfer . . . [see cl. 9, *supra*]. In such a case it could hardly have been intended that the purchaser should on the specified date perform his part of the bargain unless by that date a binding contract had been brought into existence by fulfilment of the condition; for unless that had happened by the date specified there would be on that date in truth no contract for the purchaser to perform" ([1959] 3 W.L.R. at p. 1017; [1959] 3 All E.R. at p. 915). Consequently their Lordships found for the purchaser.

As authority for the above propositions of law Lord Jenkins relied upon *Smith* v. *Butler* [1900] 1 Q.B. 694 and *Re Sandwell Park Colliery Co.* [1929] 1 Ch. 277. In the former case an agreement for sale of a public-house was made subject to a condition that the mortgagee should agree to transfer the existing loan to the purchaser; on the mortgagee's refusing to do this the purchaser treated the contract as ended and sought to recover his deposit. The Court of Appeal held that the vendor had until the date for completion to comply with the condition, Romer L.J. adding, first, that if no completion date was fixed the vendor had a reasonable time, and second, that in special circumstances a purchaser might properly regard a contract as terminated earlier ([1900] 1 Q.B. at p. 699). This decision did not, therefore, expressly go so far as that in the instant case. But in *Re Sandwell Park Colliery Co., supra*, Maugham J. (as he then was) held that *Smith* v. *Butler* impliedly supported his decision that purchasers could repudiate and recover their deposit where the vendor, a receiver, had not by the date of completion obtained the consent of the court to the sale—the contract expressly providing that it was subject to such consent being obtained. Maugham J. also said ([1929] Ch. at p. 282), in a passage quoted by Lord Jenkins, that he did not consider the general equitable principles concerning time and completion applicable to a condition on which the validity of the contract depended.

The decision seems to add a new element to the law, for the books seem to make much less of the two authorities cited. Thus *Emmet on Title* (14th ed., Vol. 1, at p. 107) does not refer to *Smith* v. *Butler* at all and cites *Re Sandwell* merely for the proposition that a party

seeking to enforce a contract (there the receiver-vendor) must be ready to perform his part. *Walford on Contracts and Conditions for Sale of Land* (2nd ed., at p. 232) cites *Smith* v. *Butler* to show that a purchaser can rarely rescind, safely, before the date for completion and does not refer to *Re Sandwell*. In Halsbury's *Laws of England* (2nd ed., Vol. XXIX, at p. 383) both cases are relied upon primarily for the proposition that a vendor has until completion to satisfy a stipulation, though the further point in *Sandwell* is briefly mentioned in a footnote. *Williams on Vendor and Purchaser* (4th ed.) refers to *Re Sandwell* once as a case where time was of the essence of the contract (Vol. I, p. 602) and elsewhere as an example of a contract subject to a condition subsequent (Vol. II, p. 974); in regard to conditions, precedent (*e.g.*, options) and subsequent, it is said that the vendor has until completion to perform them, if time is of the essence. In his valuable article on "Stipulations as to Time" at 18 *Conveyancer* (N.S.) 452 Mr. G. Boughen Graham treats *Re Sandwell* primarily as a case where surrounding circumstances made time of the essence of the contract.

It is usually difficult to know whether time has been made of the essence of a contract, either initially or by subsequent notice. But it would seem that this difficulty can be avoided if a term can be clearly framed as a condition precedent. The all-important preliminary question is of course that of construction. A provision for the payment of interest probably prevents time being of the essence, even if it is clear that the purchaser requires possession for immediate residence (see 18 *Conveyancer* (N.S.) at p. 457). Would it have the same effect if the requirement of vacant possession was expressly framed as a condition precedent? There may be room for experiment here.

Hasham v. *Zenab* [1960] 2 W.L.R. 374 (J.C.P.C.)

Sale of land—time for completion—principles determining availability of remedy of specific performance.—On February 18, 1954, the defendant gave to the plaintiff a written three-day option to purchase two acres of land; on February 19 the defendant signed a formal contract for sale, but within a few minutes tore up the document, alleging that she had been misled and had never intended to deal with more than half an acre. Completion under the contract was due on August 19, 1954, but on July 2 the plaintiff instituted proceedings for specific performance. The defendant contended that such proceedings were premature, submitting that as the plaintiff had elected to affirm the contract (instead of treating repudiation as an anticipatory and determining breach) no action could be brought until the time for completion was past. The Judicial Committee of the Privy Council (Lord Tucker, Lord Denning and the Rt. Hon. L. M. D. de Silva) rejected this defence. Lord Tucker, delivering their Lordships' judgment, said ([1960] 2 W.L.R. at pp. 376–377), ". . . the fallacy . . . consists in equating the right to sue for specific performance with a cause of action at law. In equity all that is required is to show circumstances which will justify

intervention by a court of equity. The purchaser has an equitable interest in land and could get an injunction to prevent the vendor disposing of the property [*i.e.*, the remedy is mutual]. The order for specific performance often falls into two parts. The first can be of a declaratory nature and the second contain consequential directions." Lord Tucker added that of course actual performance before the date for completion could not be compelled, and account would be taken of any new circumstance such as a frustrating event. No direct English authority was in point, but Lord Tucker found support for the Judicial Committee's view in *Marks* v. *Lilley* [1959] 1 W.L.R. 749; [1959] 2 All E.R. 647, noted *ante*, Vol. 23, at p. 392; two decisions of the Supreme Court of Canada—*Roberto* v. *Bumb* [1943] 2 D.L.R. 613 and *Roy* v. *Kloeffer Wholesale Hardware and Automotive Co., Ltd.* [1952] 2 S.C.R.(Can.) 465; the American *Restatement of the Law of Contract*, Vol. 2, s. 360; *Williston on Contract*, Vol. 5, pp. 3708–3709; and *Williams on Vendor and Purchaser*, 4th ed., Vol. 2, at p. 1001.

In *Marks* v. *Lilley*, *supra*, Vaisey J. held that a purchaser, who sued for specific performance before fixing the date for completion by notice, was entitled to his costs, although the vendor completed within ten days of the issue of the writ. Despite *Marks* v. *Lilley* and the instant decision, however, it would seem that before a plaintiff can enforce an order for specific performance he will still have to show that the proper date for completion is past. That is, he must show either that time was originally of the essence of the contract, or has become so by subsequent notice (see *Emmett on Title*, 14th ed., Vol. 1, at pp. 106–108, as amended by Second Cumulative Supplement, 1959.) But time may be saved, and pressure be brought.

The report of the instant case contains also a full survey of the facts in relation to pleas of fraud, misrepresentation, *non est factum* and undue influence, but these matters do not appear to call for any note.

Parker v. *Clark* [1960] 1 All E.R. 93 (Exeter Assizes)

Contract—intention to create legal relationship—agreement to share house—offer as memorandum in writing—Law of Property Act, 1925, *s.* 40 (1).—Informal family arrangements rarely produce legal contracts, because either there is no intention to create a legal relationship (see *Balfour* v. *Balfour* [1919] 2 K.B. 571) or the terms are too uncertain for enforcement by the courts. The instant case was exceptional.

P. and his wife, the plaintiffs agreed to come to live with C. and his wife, the defendants (who were elderly and related to Mrs. P.) during the defendants' lives; expenses were to be shared and C. said he would leave to Mrs. P. a one-third interest in his house. It was known to both parties that P. would have to sell his cottage (the plaintiffs' then home) if the move took place. C. wrote on September 25, 1955, to P. setting out the terms of the arrangement, concluding with the words "I hope your family vote for or against this will be unanimous. P. wrote accepting and subsequently preserved the letter,

referring to it when difficulties arose. For some time the arrangement worked but after two years C. became dissatisfied, and eventually P. and his wife left, and sued for damages for breach of contract.

Devlin J. held, first, after a full review of the facts, that there was a binding contract, comparing the case to an inducement to celebrate a marriage, as in *Synge* v. *Synge* [1894] 1 Q.B. 466. Secondly, he held that the letter of September 25, 1955, constituted an offer and was a sufficient memorandum in writing to satisfy section 40 of the Law of Property Act, 1925, following *Smith* v. *Neale* (1857) 2 C.B.(N.S.) 67 and *Reuss* v. *Picksley* (1866) L.R. 1 Exch. 342, and disapproving a statement by Fry J. in *Munday* v. *Asprey* (1880) 13 Ch.D. that a concluded contract must exist when a memorandum is signed. (This latter dictum is also dissented from in Megarry and Wade, *The Law of Real Property,* 2nd ed., p. 544, note 72). Consequently the plaintiffs recovered damages, assessed as four times the annual benefit of living in the defendants' house, and the value of one-third of the house, which was to have been left by will.

Such a contract is, of course, incapable of specific performance—as Lord Goddard said in *Thompson* v. *Park* [1944] K.B. 408 at p. 409, "the court cannot specifically enforce an agreement for two people to live peaceably under the same roof."

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2. *TRUSTS*

By F. R. Crane, LL.B., Solicitor

Re Hambledon's Will Trusts [1959] 1 W.L.R. 82; [1959] 1 All E.R. 353 (Ch.D.)

Variation of trusts—form of order—effect of approval by the court—Variation of Trusts Act, 1958.—In *Re Joseph's Will Trusts* [1959] 1 W.L.R. 1019; [1959] 3 All E.R. 474 (noted *ante,* Vol. 23, p. 478) Vaisey J. approved an arrangement under the Variation of Trusts Act, 1958, but, as the effective variations were not immediate, included in his order the phrase "doth authorise and direct the trustees of the said will to carry the arrangement into effect." Moreover, in *Grey* v. *Inland Revenue Commissioners* [1959] 3 W.L.R. 759; [1959] 3 All E.R. 603 (noted *ante,* p. 69) the House of Lords held that a direction to trustees to hold on trust requires to be made in writing by virtue of the Law of Property Act, 1925, s. 53 (1) (*c*); this decision was here thought to raise the question whether the adult beneficiaries who are parties to a variation of trusts should not execute a document to be approved by the court.

In the instant case, however, Wynn-Parry J. disagreed with *Re Joseph, supra,* and held, clearly and succinctly ". . . that the effect of my approval is effective for all purposes to vary the trusts. Thereafter, the trusts are the trusts as varied." As counsel submitted in argument, after such an order the only trusts which the court can enforce are the trusts as varied by the arrangement. The present decision is, with respect, to be preferred to *Re Joseph, supra,* if only on

the ground that it avoids the difficulties that might arise if trustee or adult beneficiaries subsequently objected to executing the further document contemplated in the earlier case. The main need is that the practice be settled.

Re C, 1958, No. 1050 [1960] 1 W.L.R. 92; [1960] 1 All E.R. 393 (Court of Protection)

Mental deficiency—court's power to order settlement of patient's property—principles to be followed—Law of Property Act, 1925, *s.* 171.—The Law of Property Act, 1925, s. 171 (which was new) gives the court a general power to direct a settlement to be made of the property of a lunatic or defective subject to such powers and provisions as the court may deem expedient; in particular the jurisdiction may be exercised if property may become separated from a title of honour (s. 171 (1) (*a*)), if the property has been acquired under a will or settlement (s. 171 (1) (*b*)), or if by a change in the law of intestacy, or a change in circumstances since the execution of a testamentary disposition by the patient and in some other cases, some person would suffer an injustice if no order were made (s. 171 (1) (*c*)). Section 171 (5) states that, subject to making provision for maintenance of the patient and to "providing, by means of a power of appointment or revocation otherwise, for the possibility of the lunatic or defective recovering full capacity," the court may have regard to various matters, including almost anything the court may think material, in relation to the persons or property involved (s. 171 (5) (v) (*e*)). It is to be noted that when the Mental Health Act, 1959, is brought into force by the Minister of Health, section 103 of that Act will replace section 171 of the Law of Property Act, 1925, which will then be repealed (s. 149 (2) and Eighth Schedule of the 1959 Act).

The court's discretion under section 171 is wide; the words "suffer an injustice" are to be generally construed and the court may consider what disposition the patient might have made (*Re Freeman* [1927] 1 Ch. 479; the principles there discussed were applied in six applications heard the following year and reported together—*Re Greene*; *Re Whitworth*; *Re E. A.*; *Re Fraser*; *Re Wood* [1928] Ch. 528). In *Re C. W. M.* [1951] 2 K.B. 714 the Lords Justices of Appeal sitting as judges in lunacy held that section 171 (5) did not necessarily compel the court to include a power of appointment or revocation, thereby enabling a settlement under the section to achieve its purpose of saving estate duty.

In the present case the patient was liable to recover from time to time (though the chances of this happening again were small) but if he did so would be irresponsible and very likely to dissipate recklessly his property (which fell within section 171 (1) (*b*)). Between 1955 and 1958 he had so spent some £14,000, purchasing *inter alia* five cars at the same time. On these facts Danckwerts J. followed *Re C. W. M., supra,* and ordered a settlement without any power of revocation (referring also to the earlier practice based on the Lunacy

Act, 1890, s. 105). The learned judge emphasised that the circumstances were exceptional, stating that the general principle is that a recovered patient is given full control of his property.

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3. *CHARITIES*

By A. Kiralfy, Barrister-at-Law

Re Levy [1960] 2 W.L.R. 278; [1960] 1 All E.R. 42 (C.A.)

Perpetual gift of income to charity not gift of capital.—This is a very important case on a matter of principle. In many fields there is a certain conflict of approach between property lawyers and equity lawyers, the former analysing property rights and relationships, the latter applying personal tests. Where a perpetual gift of income is made to an individual he can generally claim the capital producing the income, and it is often thought that this is based on the absence of proprietary rights in others. The Court of Appeal have now reaffirmed that the crucial matter is the intention of the donor or testator and not any property situation. Where income which will outlive a donee is given to him, it is felt that a construction as a gift of capital will give him a greater benefit than limiting him to income accruing during his life, and the donee is the object of the donor's or testator's bounty. On the other hand a charity is perpetual and has nothing to gain from a claim to capital but a change of use of the money, *e.g.*, for some construction programme instead of application to periodic recurrent needs. In the instant case the result would ultimately affect the destiny of some £250,000. The testator left the income of his residuary estate in shares to a number of charities. He imposed a gift over in certain events to another charity, which was to take the capital. It was thus clear that he understood the difference between gifts of capital and income. The court distinguished the leading case of *Philipps* v. *Chamberlaine* (1798) 4 Ves.Jr. 51, which applied the construction as a gift of capital in a gift to an individual, and *Wharton* v. *Masterman* [1895] A.C. 186, where the charity was entitled to the capital after a certain date and the only question was the fate of certain earlier accumulations. It applied the *a fortiori* reasoning of *Re Swain* (1908) 99 L.T. 604 where the court had refused to treat a gift of income to objects as a gift of capital even where the result was a failure for perpetuity. Lord Evershed M.R. considered that a condition for periodic use, implied in a gift of income, was just as valid as any other condition which might be imposed on a gift to charities (at [1960] 2 W.L.R. 288). The result of this case must inevitably be to stir up other controversies on the frontiers of equity and property, *e.g.*, odd provisions in wills for executors to burn down houses or board up windows, the true nature of short-term object trusts, the true nature of the "power in the nature of a trust." It is also difficult to reconcile with the rule that the totality of objects of a discretionary trust may, if of full age, combine and insist on sharing the funds unconditionally among themselves. This is intelligible to the

property lawyer, but is it not a breach of the clear conditions laid down by the settlor? The Court of Appeal held that it was irrelevant in this case that one of the charities was a corporation, that some had trustees and others were mere associations (*ibid.* p. 293). The position of the corporate charity is very interesting, with the clear conflict between the rules of equity based on the will of the settlor, and the rules of company law, which suppose freedom of decision by the corporators.

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4. *LANDLORD AND TENANT CASES*

By D. Macintyre, m.a., Barrister-at-Law

Stylo Shoes, Ltd. v. *Prices Tailors, Ltd.*
[1960] 2 W.L.R. 8; [1959] 3 All E.R. 901 (Ch.D.)

Landlord and Tenant Acts, 1927 *and* 1954—*business premises—service of notices—lease to limited company—transfer of registered office to new address—notice to determine tenancy sent to old address—registered letter containing notice re-directed and received at new address—validity of service.*—This was an application by the tenants of certain business premises, a company incorporated under the Companies Act, 1929, for a declaration that a notice to determine their tenancy given under the provisions of section 25 of the Landlord and Tenant Act, 1954, and addressed to the secretary of the company at a place not being the tenants' principal office nor their last known place of abode nor their registered office, had not been properly served. Section 66 (4) of the Landlord and Tenant Act, 1954, provides that the rules relating to the service of notices contained in section 23 of the Landlord and Tenant Act, 1927, shall apply for the purposes of the Act of 1954. And section 23 (1) of the Act of 1927 provides that any notice under the Act of 1927 may be served on the person upon whom it is to be served "either personally or by leaving it for him at his last-known place of abode in England or Wales or by sending it through the post in a registered letter addressed to him there or" in the case of (*inter alia*) a statutory company "to the secretary or other proper officer at the principal office" of the company. The definition of "statutory company" in section 25 (1) of the Act of 1927, however, clearly excludes a company incorporated under the Companies Acts.

The notice in this case had been sent through the post, in 1957, in a registered letter to an address in Huddersfield which was the address of the registered office of the tenant company in 1938, when the lease was granted. But in 1957 the tenants had transferred their registered office to an address in Leeds and had notified their new address to the landlords who should, therefore, have known of it. The letter containing the notice was, however, re-directed to Leeds and actually received by the tenants in course of post. Upon these facts, Wynn-Parry J., having rejected a contention that the definition of "statutory company" in section 25 of the Act of 1927 was not binding on him

in a case arising under the Act of 1954, held that a limited company is a "person" within the meaning of section 23 of the Act of 1927, and that the "place of abode" of a limited company is its place of business He held also that the landlords' notice had been validly served for two reasons. The whole purpose of section 23, in his view, is to see that a notice is given and received. The notice had in fact been left at the tenants' last known place of abode (see *Sharpley* v. *Manby* [1942] 1 K.B. 217, a decision on a similarly-worded section of the Agricultural Holdings Act, 1923, where the Court of Appeal held that a notice could be left at a last-known place of abode by ordinary post) and the failure to specify the tenant's correct address in the notice was not fatal. Moreover, the expression "may be served" in section 23, when contrasted with the imperative direction in the same section that a notice "shall be in writing," shows that the section is merely permissive, so far as the mode of service is concerned, so that the different methods of service set out in that section are not intended to be exhaustive (see *Tennant* v. *L. C. C.* (1957) 121 J.P. 428, noted at Vol. 21, p. 483). It is sufficient if the notice is actually received.

French and another v. *Elliott* [1960] 1 W.L.R. 40; [1959] 3 All E.R. 866 (Q.B.D.)

Agricultural Holdings Act, 1948—*notice to quit—notice stating two reasons under section* 24 (2) (*d*)—*one reason referred to arbitration as a result of previous notice to quit—validity of second notice—wilfully holding over—meaning of "wilfully"—Landlord and Tenant Act,* 1730, *s.* 1.—This case provides a striking illustration of the ease with which mistakes and misunderstandings can arise out of attempts to comply with certain provisions of the Agricultural Holdings Act, 1948. On September 8, 1956, the landlords served a notice under section 24 (2) (*d*) of the Act requiring the tenant to put right certain breaches of covenant within two months. On October 5, 1956, they served a similar notice in respect of non-payment of rent. And on November 13, 1956, they gave the tenant notice to quit, stating as a reason that the tenant had not complied with the notice of September 8: whereupon the tenant served a counter-notice under the Agriculture (Control of Notice to Quit) Regulations, 1948 (made under section 26 of the Act), requiring the reason stated in the notice to quit to be submitted to arbitration, so that the operation of that notice was suspended by the same regulations, until after the arbitration had been heard and determined. Then on December 6, 1956, the landlords served a second notice to quit stating as reasons (1) non-compliance with the notice of October 5 and (2) non-compliance with the notice of September 8: and they accompanied this notice with a letter stating that, since the rent had not been paid by 5.30 p.m. on December 6, a further notice to quit was being sent. In fact the notice of October 5 did not expire till midnight on December 6. In an action for possession and mesne profits Paull J. held that the statement in the letter of December 6 did not make the notice to quit of that date bad. The proper time for considering the validity of that

notice was the morning of December 7, when the notice was received: and at that time the reason given in the notice was true, even though the rent was in fact paid by letter written later on the same day. He also held that since the first reason given in the same notice was valid, that notice was not made invalid by the fact that the second reason was bad or at least could not be pursued until an arbitration had taken place. Nor did the fact that the first notice was suspended till after arbitration impose any bar on proceedings on the second notice, which had been given for a new and different reason. Possession and mesne profits were therefore ordered.

But the landlords' claim for double value on the ground that the tenant had "wilfully" held over within the meaning of the Landlord and Tenant Act, 1730, was dismissed. A tenant does not "wilfully" hold over, unless at the time when the tenancy comes to an end he stays on in the premises well knowing he has no right to do so. In the present case the tenant had on January 4, 1957, mistakenly (but understandably) served a counternotice requiring that section 24 (1) of the Act should apply to the notice to quit in a case where no counternotice was available (see s. 24 (2)). The landlords had mistakenly (but again understandably) applied to the Minister for the appointment of an arbitrator to conduct an arbitration on the reasons in the notice of December 6, for which the tenant had not asked. And there had been considerable correspondence about the appointment of an arbitrator, whom, in the event, the Minister had no power to appoint. There had, therefore, in the view of Paull J., been "a sufficient muddle on both sides to prevent the wilfulness arising, since the defendant may not unreasonably have thought that he could not be disturbed until the arbitration had taken place."

Elmdene Estates, Ltd. v. *White* [1960] 2 W.L.R. 359; [1960] 1 All E.R. 306 (H.L.)

Rent Acts—premium—sale of house to third party as condition of grant of tenancy—sale at undervalue—whether amount of undervalue a premium—whether recoverable from landlord.—The decision of the Court of Appeal in this case (noted *sub nom. White* v. *Elmdene Estates, Ltd.*, at Vol. 23, p. 401) has been affirmed. A landlord, who requires as a condition of the grant of a tenancy of a rent-controlled dwelling-house that the tenant shall sell his old house at an undervalue, requires the "payment" of a "premium" within the meaning of the Landlord and Tenant (Rent Control) Act, 1949: and that "premium" can be recovered from the landlord, even though it has been paid to a third party. A "premium" in this context includes not only a fine or other like sum but also any other "pecuniary consideration" in addition to the rent (see s. 18 (2) of the Act). "Pecuniary consideration" is present whenever the benefit obtained by the landlord or the detriment suffered by the tenant is expressed in terms of money; and where there is a "pecuniary consideration," then there must be a "payment" of that consideration, no matter what particular method of transferring the required consideration may have been adopted.

Cancellation of a debt due from the landlord to the tenant, for example, will suffice.

Nor is it necessary for a premium to have been paid to the landlord personally. The observations of a Divisional Court to the contrary in *R.* v. *Birmingham Rent Tribunal* [1951] 2 K.B. 54 have again been firmly rejected.

Keats v. *Graham and another* [1960] 1 W.L.R. 30; [1959] 3 All E.R. 919 (C.A.)

Repairs—damages for breach of covenant to repair—building erected under temporary planning permission—whether to be demolished "at or shortly after termination of tenancy"—evidence of events after termination of tenancy—admissibility—Landlord and Tenant Act, 1927, *s.* 18 (1).—Section 18 (1) of the Landlord and Tenant Act, 1927, provides, as is well known, that damages for breach of a covenant to leave premises in repair shall not exceed the amount by which the value of the reversion is diminished: and it goes on to provide that no damage shall be recovered for a breach of any such covenant "if it is shown that the premises, in whatever state of repair they might be, would at or shortly after the termination of the tenancy have been or be pulled down. . . ." The vital moment, at which the intention to pull down the premises must exist, is, of course, the date upon which the tenancy is terminated (see *Salisbury* v. *Gilmore* [1942] 2 K.B. 38). The question was whether, upon the facts of this case, the necessary intention existed at the relevant time.

The demised premises consisted of a building, together with an extension at the back, which had been let to the tenant for three years from August, 1952, by a lease which contained a covenant by the tenants to keep the premises in good and substantial repair. The extension had been added in 1949 on the terms of a temporary planning permission granted for seven years from April 1, 1949, which provided that the building should be removed at the end of that period, unless the council should previously have approved its retention. In February, 1954, an application for an extension of the period beyond April 1, 1956, was refused. On April 1, 1956, the seven-year period expired: but no enforcement proceedings were taken after that date, although an appeal against the refusal to extend the period was refused. Then on December 12, 1956, the local planning authority wrote a letter requesting an assurance within fourteen days that the extension would be removed; whereupon the tenants decided to leave the premises and the tenancy came to an end on March 27, 1957. In May 1957, however, the landlord let the premises to a new tenant: and in October, 1957, she obtained permission to retain the extension till December, 1962. Upon these facts the Court of Appeal held that on the date of the termination of the old tenancy the inevitable inference from the facts as they existed at that date was that the premises were then going to be pulled down. That being so, the tenants could not be held liable for failure to leave the extension in substantial repair at the end of the tenancy despite the subsequent change of intention. Evidence of events which occur after the material

date is immaterial and therefore inadmissible, save in so far as it may help to clear up any doubt or uncertainty with regard to the position on the material date. In the present case, however, there was no such uncertainty.

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5. *REVENUE CASES*

By David R. Stanford, m.a., ll.b., Barrister-at-Law

Hochstrasser v. *Mayes* [1960] 2 W.L.R. 63; [1959] 3 All E.R. 817 (H.L.)

Income tax—Benefit to employee—Agreement collateral to service contract

Statutory provision: Income Tax Act, 1952, s. 156, Schedule IX, rule 1.

Point: The House of Lords unanimously upheld the decision of the Court of Appeal (noted *ante*, Vol. 22, p. 396) that a payment under an indemnity whereby the company protected their employees from loss on resale of their houses on moving the site of their employment, was not a taxable perquisite or profit from the employment. Whilst in agreement with the reasons given by the majority of the Court of Appeal, the House of Lords stressed that care must be taken in looking at the glosses placed upon the statutory provision by judicial decisions. Such glosses are of value as illustrating the idea which is expressed by the words of the statute, but they do not displace those words.

The decision does not rule that a taxable profit cannot take the form of a discharge of an employee's obligation as well as of a direct payment, nor that a lump sum payment may sometimes be subject to tax just as any other circumstances demand. It is not sufficient to render a payment assessable that an employee would not have received it unless he had been an employee; it is assessable if it has been paid to him in return for acting as or being an employee.

Unit Construction Co., Ltd. v. *Bullock* [1959] 3 W.L.R. 1022; [1959] 3 All E.R. 831; (1959) T.R. 345

Income tax—Company—Residence—Subvention payment

Statutory Provision: Finance Act, 1953, s. 20 (9).

Point: The House of Lords have now unanimously reversed the decision of the Court of Appeal which had upheld the decision of Wynn-Parry J. (noted Vol. 22, p. 397). The question at issue was whether a company the constitution of which vested the control of the business in directors who met in Kenya, and had no power to meet in the United Kingdom, was resident in the United Kingdom for tax

purposes. It was admitted, though without reason given, that the company was resident in Kenya, but the possibility of a second residence in the United Kingdom arose because the directors of the English holding company, meeting and operating in England, issued instructions and orders upon which the Kenya company acted. These instructions were obeyed because of the sanction available to the holding company in that they had the shareholding right to remove the boards of the subsidiaries. Within the constitution of the Kenya company, however, the board could have ignored the instructions given to it by the board of the English company as direction in this manner is not possible to shareholders as a matter of law.

The lower courts found that residence of a company in the time-honoured words may be properly found where the company " really does business, that is to say, where the central power and authority, which, according to the ordinary constitution of a limited liability company, is vested in its board of directors, and the exercise of that power and authority is to some substantial degree to be found." Their interpretation of this was that mere *de facto* power is not sufficient to cause the company to be resident in the country where the persons exercising such *de facto* power reside; a company resides where the control exercised within the constitution of the company takes place. The House of Lords rejected this interpretation and held that central management and control is situate where the actual control takes place, even though such control is unconstitutional. The facts are not to be disregarded in favour of where the management and control ought to be exercised. Viscount Simonds (at [1959] 3 All E.R. 834) held " nothing can be more factual and concrete than the acts of management which enable a court to find as a fact that central management and control is exercised in one country or another. It does not in any way alter their character that in greater or less degree they are irregular or unauthorised or unlawful. The business is not the less managed in London because it ought to be managed in Kenya."

Lord Radcliffe was at pains to point out that residence in Kenya was a matter of admission on both sides and had not been justified before the House. Thus, although the finding that the company was resident in the United Kingdom appeared on the face of it to show that the House accepted the principle that a company could have more than one residence, it was not intending so to do. " This case ought not to be regarded as in any sense an authority on the problems of double residence of a company."

The rule for establishing where the residence of a company lies may be an artificial one; however, it is now established finally that that rule must be interpreted according to the facts and common sense and not as a technical and legal fiction. The major difficulty which would seem now to arise will be the question of multiple residence, for if the residence cannot be determined by reference to the constitution an itinerant board may apparently give rise to residence in numerous countries, particularly if the company is going to act in accordance with the wishes of persons who theoretically have no power to determine its operations.

Public Trustee v. *I. R. C.* [1960] 2 W.L.R. 203
[1960] 1 All E.R. 1 (H.L.)

Estate duty—Gift to holder of an office—Relationship between section 1 *and section* 2 *of Finance Act,* 1894

Statutory Provisions: Finance Act, 1894, ss. 1 and 2 (1) (*b*).

Point: The greatest estate duty hare of all time has finally been run to earth. The relationship between sections 1 and 2 of Finance Act, 1894, was determined, it was thought finally, by a speech of Lord Macnaghten in *Earl Cowley* v. *I. R. C.* [1899] A.C. 198, at pp. 212–213, when he said, "Now, if the case falls within section 1 it cannot also come within section 2. The two sections are mutually exclusive." This considered opinion of that learned judge has been acted on and has been the source of endless doubt and confusion to all who have been concerned in the examination or administration of this branch of the law. The opinion, however, was unnecessary to the decision of the case in which it was given and although the Court of Appeal (see *ante*, Vol. 22, pp. 309, 310) felt that nothing had happened to justify the court in saying that the matter was open for review, the House of Lords has now finally overruled that opinion. With only one dissentient voice, the House of Lords has now held that section 2 defines the precise area of the charge to estate duty, which charge is imposed in general terms in section 1. The two sections are not mutually exclusive and the reason for section 2 is to explain the meaning of the word "passing" which appears in section 1, and which was not previously a term of art, as well as to extend its meaning beyond any normal meaning which could be given to that word merely as a question of consideration of the English language.

It follows, therefore, that where a person holds an interest only as holder of an office and dies whilst holding that office, the charge to duty on his death is ousted by the concluding words of section 2 (1) (*b*), even though the interest was a life interest in an aliquot share of the fund. Previously, it has been thought that on the death of a life tenant, property passed under section 1 and no reference needed to be made to section 2, thus eliminating the words at the end of section 2 (1) (*b*) excluding an interest as holder of an office. It is now clear that the charge under section 2 (1) (*b*) and the charge under section 1 are the same charge.

Despite the fact that the opinion of Lord Macnaghten has been acted on for some sixty years, it is not anticipated that the result of the decision will be to change the law as set out in numerous cases in which Lord Macnaghten's opinion has been referred to. Lord Radcliffe (at [1960] 2 W.L.R., p. 220) stated that he had only been able to detect one line of case in which Lord Macnaghten's construction had been the determining agent of the judgment arrived at. Those were the cases of terminable annuities settled for successive life interests (see *Re Cassel* [1927] 2 Ch. 275 and *Re Duke of Norfolk* [1950] Ch. 467).

Parker v. *Lord Advocate* [1960] 2 W.L.R. 262; [1959] 1 All E.R. 20 (H.L.)

Estate duty—Interest arising by survivorship

Statutory Provisions: Finance Act, 1894, s. 2 (1); Finance Act, 1934, s. 28.

Point: Where an interest was held during the life of the deceased and an interest substantially different in kind arises on the death of the deceased, duty may be exigible on the post-death interest, although there is some financial similarity between that and the pre-death interest. It is immaterial for the purpose of the charge to duty that the interest could have been left by a document worded so that there was no substantial difference between the two interests.

Facts and Decision: By a Scottish settlement, the truster transferred certain investments to trustees for behoof of her three children. During the life of the truster the children were entitled to the whole income of the trust fund equally, issue of deceased children representing their parent. After the death of the truster, the trust fund became the absolute property in equal shares of the three children. Had the children died (which they did not) their issue would have been substituted in the trusts of capital, or there would have been an accruer in default of issue to the other children. It was argued that on the death of the truster, the children's previous interests *pur autre vie* were merely enlarged to absolute interests and that duty was only exigible on the excess of value of the interest in capital over the interest of each child for life.

Held unanimously that the rights of a beneficiary before the death was the usufruct of a fund in the hands of trustees during the joint lives of the beneficiary and the truster, there being no right to the *corpus*. After the death, a child if surviving the truster became entitled to one-third of the fund absolutely. This latter interest was wholly distinct from the former and must be deemed to be included in the property passing on the death under Finance Act, 1894, s. 2 (1) (*d*). The interest in expectancy contingent on surviving the Truster could not be deducted in view of Finance Act, 1934, s. 28.

It would appear likely that no claim to duty would have been effective had the children been entitled to the income during the lifetime of the truster, merely by reason of their contingent interests in capital carrying the intermediate income. However, the disposition of income during the life of the truster was a distinct and separate gift thereof. The principle that the estate duty charge is based upon the rights in the form in which they appear in the documents was reiterated, and no regard can be had to the substance of the transaction, either to impose duty or to exonerate property therefrom.

THE LIBRARY

Copyright in Industrial Designs. Third ed. By A. D. Russell-Clarke, Barrister-at-Law. London: Sweet & Maxwell, Ltd. xx, 142, (appendices) 86 and (index) 5 pp. (£2 net.)

In the good old days, every little legal speciality had its own specialist text-book; and the practitioner faced with a case on that subject had only to consult Mulligatawny on *Tombstones* (or as the case might be) to find what he wanted—mention of all the possibly relevant statutes and all the possibly relevant cases, with quotations of the proper passages from the most important judgments. *Russell-Clarke* is one of the few such books that remain; and any stranger to the subject, faced with a case about designs, may be thankful that it does. It has its faults; one would have liked to see fuller discussion of the recent signs of change in the attitude of the courts to infringement, for instance; the author would have done better to have printed both the Registered Designs Act and the Designs Rules in amended form; and the Copyright (Industrial Designs) Rules should have been included—not the less because they are almost meaningless. Nevertheless, many practitioners would find this book an easier introduction to the subject than the sections on designs in larger works, which offer the only alternative.

T. A. B. W.

Income Tax Maintenance Relief and Agricultural Allowances. Second ed. By F. E. Cutler Jones, B.A., C.A. London: Sweet & Maxwell, Ltd. xx, 270 and (index) 12 pp. (32s. 6d.)

It seems hardly credible that a second edition is both cheaper and shorter than the first, but such is the case. In the first edition, the author was breaking new ground and his arrangement was not entirely satisfactory. In the new edition there has been a certain amount of rearrangement, which is an improvement and is undoubtedly more coherent. The text has been brought up to date and there is a number of minor alterations. As so much depends on Revenue practice which is not necessarily consistent, those alterations are of considerable importance. In dealing with the liability for Schedule A tax where one building is let off to various persons, the author notes some of the difficulties of the Finance Act, 1957, s. 18 (reversing *Gatehouse* v. *Vise* [1957] Ch. 367), but he by no means covers all the ground. If the lessee and lessor both wish that the lessor shall be assessed to Schedule A tax, will the Revenue agree where the rent is less than the assessment? The answer is apparently "No." When will the Revenue assess the lessee even where the rent exceeds the assessment? The last paragraph of section 75 of the book is far from clear.

Not unnaturally, an accountant's approach to the subject differs considerably from the lawyer's, but an ounce of practice is worth a ton of theory. The lawyer would be likely to deal with the effect of the legislation—one can hardly talk about principles in relation to income tax—but stop short when it comes to the application of the legislation to, say, a change to fluorescent lighting. The author tells the reader, in effect, how to set about his job of making maintenance claims, and, in detail, what he is likely to be able to get away with.

It is, of course, the fact that the amount involved in maintenance claims is often small. Mr. Cutler Jones's book justifies itself for this very reason. A person of reasonable intelligence, solicitor, accountant or layman, who has

never made a maintenance claim before, could, armed with the book, make a workmanlike effort and there is little doubt that the new edition is an improvement on the first.

E. F. G.

The Town and Country Planning Act, 1959. By Robert Schless. London: Butterworth & Co. x, 136 and (index) 11 pp. (£1 5s. net.)

This book is a reprint of Butterworth's *Annotated Legislation Service Statutes Supplement No. 116.* It is 148 pages long, and comprises a brief ten-page introduction: the text of the Act with annotations: the statutory instruments made under the Act: and a twelve-page index. As will be gathered from the size of the book, and its comparatively modest price, this is not an exhaustive commentary on the Act or its implications. Whilst some general notes explanatory of the sections are provided, there are very few on Part I of the Act which is, by common consent, the most difficult to understand. The notes do, however, provide all necessary internal cross-referencing which is necessary for accurate construction of the provisions, as well as references to words and phrases, statutory provisions, and the like. The book should be useful for those offices which need a considerable number of copies of the Act in handy form for everyday reference, and who possess more detailed works for consultation on points of difficulty.

J. K. B.

We have also received:—

Slum Clearance and Compensation. By J. F. Garner, ll.m., Solicitor. *Oyez Practice Notes, No. 45.* The Solicitors' Law Stationery Society, Ltd. 76 pp. (10s. 6d.)—The author is familiar to all readers of the *Conveyancer*: he has made his special contribution to legal literature by expounding for private practitioners those departments of law particularly dealt with by local authorities. The general practitioner has to pick this up more or less empirically and if he is not prepared to accept everything he is told by the local authority—and be it remembered that the teller may be an experienced town clerk or a solicitor just admitted after scraping through the Final at the third attempt—he must find short but reliable guides to fingerpost the path for him. This is one such guide.

Hanson's Death Duties. Tenth ed. Fourth Cumulative Supplement (to August 1, 1959). By Henry E. Smith, ll.b., assisted by P. H. Fletcher, ll.b., Barrister-at-law. London: Sweet & Maxwell, Ltd. xi and 157 pp. (£1 1s.)—The Finance Act, 1959, fiddled about with life insurance policies and "exclusion of donor, or owner of an interest, from possession or benefit." We suppose annual supplements are better than loose leaf publications.

Current Legal Problems, 1959. Edited by George W. Keeton and Georg Schwarzenberger. Stevens & Sons, Ltd. 280 pp. (£1 17s. 6d.)—This year's volume of public lectures delivered at University College, London, is not of special interest to the conveyancer, but, as usual, matters of topical interest, such as liability for radiation injuries and the Restrictive Practices Court, counterbalance the hardy annuals, such as charities and the perpetuity rule.

CORRESPONDENCE

To the Editor,
The Conveyancer and Property Lawyer

Sir,

At page 6 of the January/February issue you write:

"In the High Court recently a claim for possession took nine years to come up for a hearing; there was no answer apparently, but the court evidently thought the defendant had not had long enough and gave him a further six weeks."

Your readers would, no doubt, be interested to learn whether the writer of that passage had made any and, if so, what enquiries to ascertain whether the nine years' delay was the result of consent adjournments for the convenience of the litigants or as a result of delay in the court. If the court obliges litigants in granting adjournments by consent it is unfair and unjust to blame the court for the delay.

If a plaintiff feels that it is in his interest that proceedings should not be brought for adjudication, he, and others not concerned with the matter, ought not to be heard to complain if the court obliges the plaintiff and allows the matter to stand over.

Perhaps the writer of the passage I have quoted will take your readers into his confidence and let them know whether the delay was due to the fact that the court at any stage in the proceedings obliged the parties or otherwise.

Yours, etc.,

EDWARD F. IWI.

London, March 1, 1960.

[Readers may draw their own inferences from the report in *The Times* of October 15, 1959. Presumably the parties took the trouble to explain the position to the judge.—Editor.]